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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

T. LAMAR CAUDLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

C. ARTHUR ANDERSON,
722 Chestnut Street,
St. Louis, Missouri,
WALTER M. HAYNES,
Winchester, Tennessee,
JOHN J. HOOKER,
1106 Nashville Trust Building,
Nashville 3, Tennessee,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on November 15, 1957.

Note: The pages of the Record in the Court of Appeals are designated "R. ...."; and the pages of the original Transcript of the evidence and the Successor Judge's opinion as "Tr. ....."
All emphasizing type in the petition is ours.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, printed in Appendix A hereto, infra, p. 43, is not reported.

The opinion of the Court of Appeals for the Eighth Circuit, printed in Appendix B hereto, infra, p. 84, is not yet reported.

JURISDICTIONAL STATEMENT.

The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of United States Code. The date of the judgment of the Court of Appeals for the Eighth Circuit sought to be reviewed by certiorari is November 15, 1957. A petition to rehear was denied by the Court of Appeals for the Eighth Circuit on December 13, 1957, by order presented as Appendix C hereto, infra, p. 107. An order presented as Appendix D hereto, infra, p. 108, was entered in this Court on December 30, 1957, extending the time for filing a petition for writ of certiorari in this case to and including January 23, 1958, and the date of this application for certiorari is January 22, 1958.

QUESTIONS PRESENTED FOR REVIEW.

The questions herein presented are:

1. Petitioner was deprived of the fair trial guaranteed by the Fifth Amendment to the Constitution of the United States because the Court of Appeals held that after the death of the District Judge who tried the case, a successor judge who heard none of the proof and had not seen and observed the petitioner on the witness stand, could pass upon pending motions for a judgment of acquittal, a mistrial and a new trial, and impose sentence upon petitioner, all of which required "the feel of the case."

2. The Court of Appeals erred in affirming the action of the Trial Judge and Successor Judge in denying petitioner's motions to dismiss the indictment and suppress evidence obtained from petitioner and his co-defendant in their grand jury interrogation without their being advised that an indictment against them would be sought in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States.

3. The Court of Appeals erred in affirming the action of the Trial Judge and Successor Judge in overruling petitioner's motions for a severance and for a mistrial after a mistrial was granted as to his co-defendant Schwimmer.

4. Petitioner's constitutional rights were violated by the order of the District Judge (affirmed by the Court of Appeals) that the case be tried by a jury selected from a panel from certain designated rural counties of the Division, to the exclusion of St. Louis and St. Louis County, and by the concealment by two jurors who tried the case of certain important facts relative to their qualifications as jurors.

5. The Court of Appeals erred in affirming the action of the Trial Judge and Successor Judge in admitting Exhibit 100-J and in admitting the Oliphant telephone log.

6. The Court of Appeals should have sustained petitioner's motion for a judgment of acquittal or a new trial because of the insufficiency of the evidence.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved in this case is the Fifth Amendment, which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in

the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE.

The Indictment.

The petitioner was indicted on December 1, 1955, in the United States District Court for the Eastern District of Missouri, Eastern Division (R. 1). The indictment charged a conspiracy between Matthew J. Connelly, Appointment Secretary to President Truman; petitioner T. Lamar Caudle, Assistant Attorney General in charge of the Tax Division of the Department of Justice; Harry I. Schwimmer, a Kansas City lawyer; Ellis N. Slack, an attorney in the Department of Justice; Irving Sachs, a St. Louis shoe broker; and Shu-Stiles, Inc., a corporation which Sachs controlled, the last three parties being named as co-conspirators, but not indicted. The indictment, in one count, charged a conspiracy to defraud the United States of the proper administration of the Internal Revenue laws and regulations, and of the proper and faithful service of the defendants Connelly and Caudle, petitioner herein, and to commit the offenses of bribery, perjury, and knowingly making false statements and entries, in violation of Title 18, Section 371, U. S. C. (R. 10). *The District Judge at the close of the evidence withdrew from the consideration of the jury all allegations of the indictment relating to the substantive offenses of bribery, perjury, and knowingly making false statements and entries* (R. 3130).

The gravamen of the offenses charged in the indictment was an alleged conspiracy with reference to the handling of an income tax fraud case of Sachs and Shu-Stiles, Inc. It was charged that the conspiracy was intended to protect Sachs from indictment, prosecution and imprisonment; that co-defendant Schwimmer, attorney for Sachs and Shu-Stiles, Inc., promised and gave money and things of value to Connelly and Caudle, the petitioner herein, to influence their actions; that as respects petitioner, influenced by the promise of reward, he would persuade his assistants to recommend no prosecution (R. 4-6). Petitioner is further charged with making false and misleading representations to the District Court and its Probation Office with reference to Sachs; and concealing the conspiracy and obstructing any investigation thereof (R. 6-7).

The Proceedings Before the Grand Jury.

Under compulsion of subpoena petitioner was required to testify before the Grand Jury on November 21, 22 and 29, 1955 (Tr. 121-3, 131, Vol. I), without being warned that he was being investigated, when as early as November 21 and 22 petitioner had already become "a probable defendant," as stated by the special prosecutor, Wyllys Newcomb, the preparation and indictment having commenced on November 22, 1955. Petitioner under compulsion of the Grand Jury turned over to government agents some 30,000 pages of records and papers on November 23, 1955 (Vol. I, Tr. 128, 1615, 2674), the day after the indictment had been drafted. Such portion of these documents as the Government cared to use were admitted in this case over petitioner's objection.

Selection of the Jury.

The District Judge ordered that the jury panel be drawn from certain rural counties, excluding the City of St. Louis and the County of St. Louis (R. 133-4), thus excluding the

geographical area, in which is situated more than 80% of the population of the Division. The effect of selecting the jury by this method was to exclude large Catholic, Jewish, Negro and labor groups residing in St. Louis, and to limit the panel largely to rural veniremen. Petitioner's motion to quash the panel, based upon proof, was denied (Tr. Vol. IV, 3-4).

On the *voir dire* examination of jurors the District Judge interrogated them respecting their political activities and affiliations (Tr. Vol. II, 37-38, 44-46). Two lady members of the jury that tried the case failed to disclose their political affiliations and activities (Tr. 3228-3248).

The Trial in the District Court.

The trial of this case lasted for more than a month, resulting in a transcript of about 3200 pages, including over 200 exhibits of more than 1000 pages. The testimony with reference to important issues of the case will be briefly analyzed.

The Sachs Income Tax Case.

The income tax returns of Shu-Stiles, Inc. (Ex. 2-J, Tr. 101), were examined beginning the latter part of November, 1945. Supplemental information was furnished until May 28, 1947, when *Sachs paid the sum of $187,472.62 in taxes, including interest and fraud penalties* (approximately $70,000.00) *for the years 1942-1945, both inclusive* (Ex. 3-I, p. 44, Tr. 106), *which satisfied all civil liabilities* (Tr. 1984).

This tax inquiry did not reach the Department of Justice or come to the attention of the petitioner until August 1949 (Exs. 9-AA and 9-BB, Tr. 325), when the case was assigned to Arthur B. Cunningham, a Department of Justice lawyer, one of petitioner's assistants (Tr. 1658), who expected a conference with Schwimmer in the fall of 1949 (Exs. 9-MM, 9-NN, Tr. 480).

Due to a heart attack, Schwimmer requested petitioner's co-defendant Connelly for a postponement of the conference, which was granted (Tr. 1658, 2463). Connelly talked to petitioner over the telephone and arranged a conference for Schwimmer on October 26, 1949 (Tr. 2601). *Thus two telephone conversations, that is the one postponing the conference and the later one arranging the conference, are the only two conversations between Connelly and petitioner that ever took place about this case.*

This conference was attended by petitioner and his first assistant, Turner L. Smith, a government witness, and Schwimmer advanced the health issue, asserting that Sachs was suffering from grand mal epilepsy (Ex. 9-CC, Tr. 1196, 1661, 2602-3). Later in a conference with Cunningham, Schwimmer presented affidavits of three prominent St. Louis doctors, Irwin Levy, Llewellyn Sale and N. W. Freund, confirming the assertion that Sachs suffered from grand mal epilepsy and that a criminal prosecution might prove fatal (Ex. 9-DD, Tr. 347).

Dr. Robert M. Bell, a doctor selected by the Government to examine Sachs, and who examined Sachs for less than one hour, confirmed the diagnosis of epilepsy, but thought that fatal outcome was "remote indeed" (Ex. 9-EE, Tr. 351).

Cunningham recommended prosecution, following which an additional letter from Dr. Bell, and the interrogatories of two distinguished St. Louis specialists, Dr. Louis L. Tureen and Dr. Robert D. Brookes were received. These interrogatories strongly supported the taxpayer's contention (Ex. 9-FF, Tr. 356; Ex. 9-KKK, Tr. 1866-7; Ex. 9-GG, Tr. 361, 1782; Ex. 9-J, Tr. 369).

Cunningham prepared a memorandum (Ex. 11-ZZ, Tr. 1845) and it was decided to submit medical information to either the Bethesda Naval Hospital or the St. Elizabeth Hospital, another Government hospital in Washington

(Tr. 1804), the latter being chosen (Ex. 10-G, Tr. 449, 2068).

Dr. Silk, acting Superintendent of St. Elizabeth Hospital, and a board of his staff concurred in the finding that prosecution might be fatal to Sachs (Ex. 10-F, Tr. 439).

Cunningham insisted on recommending prosecution, but his superiors, Rothwacks and Smith, both government witnesses, recommended to petitioner civil sanctions rather than prosecution (Ex. 10-EEEE, Tr. 1696-7, 1787-8).

Once more petitioner confirmed by long distance telephone conversation to Dr. Brookes the overwhelming medical finding that prosecution might be fatal to Sachs (Tr. 2815), and after deciding against prosecution returned the file to the Commissioner of Internal Revenue on January 11, 1951 (Ex. 10-FFFF, Tr. 1218).

The Government's witnesses, all lawyers in the Department of Justice, Arthur B. Cunningham, Meyer Rothwacks, Turner Smith and Frederick G. Folsom, who were charged with having been improperly influenced by Caudle (R. 53), all testified positively and unequivocally that the Sachs case had been given the same kind of treatment as all other such cases, and that they did not observe anything wrong or improper in the handling of this case by petitioner (Tr. 1278, 1314, 1797, 1859-66, 2086-7).

Drake Watson, United States Attorney in St. Louis, was instructed by the Attorney General to assist the Grand Jury in connection with any cases they saw fit to investigate (Tr. 1711-3, 1716, 1719-20, 1726, 1793), and on March 1, 1951, Sachs was indicted for an income tax fraud for the years 1942-1944, both inclusive (Tr. 866-8, 1905, 1908).

The Sachs case was set before District Judge Harper, who caused an independent investigation to be made of Sachs' health by his Chief Probation Officer, Milton Weif-

fenbach. The Probation Officer asked petitioner for medical reports and his opinion about Sachs' prosecution and confinement (Tr. 2038, Ex. 10-EE, Tr. 2012). Cunningham first replied to Weiffenbach's request stating that the Department of Justice would make a recommendation only upon the request of the Court and would ordinarily recommend a prison sentence (Ex. 150, Tr. 2014-5, 2069). The government witness Folsom, at petitioner's request, wrote a second letter to the Probation Officer withdrawing the Cunningham letter and stating that Sachs fell within the health policy (Ex. 140, Tr. 2025, 2072, 2084).

At a hearing before Judge Harper on November 21, 1951, Sachs pleaded guilty. The Probation Officer's report, based on his own investigation, recommended probation (Ex. 167, Tr. 2045). Judge Harper found Sachs guilty of a clear violation of law, but stated that the record presented "the most complicated medical problem of any case that I have ever had before me" (Ex. 155, Tr. 4180). *The District Judge sustained petitioner's finding concerning Sachs' health and admitted him to probation without requiring him to serve any sentence.* Sachs was fined $10,000.00 on each of the four counts or a total of $40,000.00, which fines were paid (Ex. 155, Tr. 479, 1826).

The Oil Royalties as Respects Petitioner.

The Government's insistence that petitioner participated in an unlawful conspiracy and received a reward or a promise of a reward for his participation is based upon certain oil royalty transactions, the facts with respect to which, briefly, are as follows:

About a year after the Sachs case reached the Department of Justice, Schwimmer discussed investments with petitioner and petitioner passed on to Schwimmer a suggestion that he had received about the value of certain stock (Tr. 2668). Later, Schwimmer told petitioner he wanted

to return the favor, but petitioner told him in no uncertain terms he could do nothing for him (Tr. 2669). However, in July of 1950, Schwimmer purchased an oil royalty for $3300.00 from one Rhodes, in the name of petitioner, *without consulting with petitioner* (Ex. 76-M, Tr. 1112).

On August 4, 1950 Schwimmer told petitioner that he had purchased an oil royalty for him for $750.00, and petitioner severely reprimanded him (Tr. 2671, 2673). Petitioner insisted that the property be taken out of his name immediately, but, being misled by Schwimmer into believing that he first had to sign a transfer order so that royalty checks issued by the oil company might be collected by Schwimmer, petitioner signed such order (Tr. 2672, 2680). Schwimmer completely apologized to petitioner for his conduct and petitioner accepted his apology.

Eight royalty checks were issued in petitioner's name before the property was transferred to the Schwimmers in April of 1951 (Tr. 2576, Exs. 78-M and 78-J, Tr. 1043, 1047), *but the undisputed proof shows that petitioner did not receive one cent from any of these eight checks, or in any other manner in connection with this matter.* Petitioner reluctantly endorsed three accumulated checks totalling $184.01 to Schwimmer on promise that he would send deed to be signed; then, again, cashed one small check of $60.63 on another promise. The last four checks not known to exist by the petitioner were forged by Schwimmer, who endorsed them and cashed them in Kansas City (Tr. 1571-2, 2688). The forgery of these checks by Schwimmer is conclusive evidence of the fact that there was no conspiracy between Schwimmer and petitioner.

Mistrial as to Schwimmer.

Schwimmer suffered a heart attack during the trial of this case after it had been in progress for more than two weeks and a mistrial was granted as to him (Tr. 1486, 1535).

Certain testimony was admitted during the time that Schwimmer was a defendant in the case, and after a mistrial was ordered as to Schwimmer, the petitioner moved for a mistrial on the grounds that such evidence was of such prejudicial nature that it would be impossible for the jury to disregard it, notwithstanding any instruction given by the Court, and that petitioner would be deprived of his right to cross-examine Schwimmer about these matters concerning which only he could answer.

A Kansas City lawyer by the name of Sheffrey, a government witness, testified that after Schwimmer had mentioned to him certain royalties in connection with petitioner and Sheffrey had tried to dissuade Schwimmer from any idea of having any transactions with petitioner about any oil royalties (Tr. 855-7), that Schwimmer told him: "Dave, I want you to know I got rid of that stuff" (Tr. 858).

After petitioner was indicted, Sheffrey testified that he had two telephone conversations with Schwimmer, in the first of which Schwimmer wanted to know what Sheffrey had told the prosecutor on the day before. Sheffrey further testified that Schwimmer tried to persuade him that his recollection of the prior conversation about the oil royalties had been incorrect (Tr. 870-71).

Sheffrey testified that the second telephone conversation was substantially as follows:

> "It was on a Sunday morning, and he said, 'Dave, I'm terribly worried about you,' and I said, 'You are, Harry?' and he said, 'Yes, worried what the Bar Association will do when they find out that you know all about this and still continued in the case or knew all about something that was wrong and continued in the case,' I don't know how he put it, and I said, 'Harry, don't worry about me,' and he said, 'Well, I am worried about myself, too,' and I said, 'Well, Harry, if I done anything wrong, I don't know that it is, but

if I have, I will just have to pay the consequence. That will be no excuse for me getting on the stand under oath and not testifying to my best recollection of what it was,' and he said, 'Dave, well, you are way off base,' and I said, 'Well, I hope for your sake that I am, Harry. All I can tell you is that is my best recollection of what took place, and that is what I am going to have to testify to' " (Tr. 871-3).

Also, during the time that Schwimmer was a defendant, certain testimony was admitted as to Schwimmer alone concerning the conversation between him and W. J. Dean, who had stored certain of Schwimmer's records which were subpoenaed by the Grand Jury in the case. Dean testified that Schwimmer asked him upon his return from Puerto Rico if he could go to the warehouse and get some records he thought that the Government wanted. Dean objected to this procedure and suggested that Schwimmer call his, Dean's lawyer, Joe Hoskins. Dean testified that Schwimmer said that Hoskins told him it was all right for him to get these records. Schwimmer searched for the records at the warehouse (Tr. 1249-50). Dean said that he later told Schwimmer that his lawyer, Hoskins, had not given his permission to Schwimmer to search for and take any of these records from the warehouse (Tr. 1256-7).

The deceased district judge who tried the case overruled petitioner's motion for a mistrial based on these grounds "at the present time" (Tr. 1547).

Later, petitioner renewed his motion for a mistrial and filed an affidavit showing that Schwimmer was still confined with a heart attack and was not able to appear in Court or give his deposition (Tr. 2206-9).

The deceased district judge who tried the case stated that the motion for a mistrial presented "such a serious question", that he would let the case proceed, "and if there should be a conviction, then have time to give it the study it deserves" (Tr. 2208, 2209).

Exhibit 100-J.

The District Judge during his lifetime admitted Exhibit 100-J, which reads as follows:

"Oct. . . . 49

Shu Stiles	$10,000
Pd out Oil Royalty M. C.	4,200
held in Escrow to be paid out depending on whether I. Sachs case is dropped." ...	$ 5,800

Petitioner objected to the admission of this evidence on the grounds of incompetency, immateriality and irrelevancy, and after a mistrial was granted as to Schwimmer, on the further ground that petitioner was deprived of the right to cross-examine the alleged maker of the entry (Tr. 1372, 1639).

The District Judge deferred his action on the admission of this exhibit, excluded it from the evidence, later admitted it, later expressed the opinion that petitioner's co-defendant Connelly made it admissible by his testimony before the Grand Jury, later said that he was "sleeping on it," again withdrew it (Tr. 2881-2882), again excluded it (Tr. 2883), then stated that he had an instruction on it and that he intended to give that instruction withdrawing the exhibit (Tr. 2884), said, "It is a very poisonous piece of evidence" (Tr. 2884-5), expressed doubt that it was admissible under the law (Tr. 2286) and observed that he would think about it a litle further (Tr. 2888)

The Trial Court's uncertainty about the admissibility of this exhibit appears from what occurred on June 11, 1956:

> "The Court: This Exhibit 100-J has given me a lot of concern because of the absence of defendant Schwimmer, and I finally concluded that it should be withdrawn from the jury because the defendant Schwimmer is not here to explain the entries on it and I think it would be unfair to leave it in this record.

I have thought about it a lot and if Schwimmer were here it would be different, but Schwimmer isn't available to the defendants, or either of them, to explain it and there is nothing here to show that if they had an opportunity on a later trial to secure his presence that they could have some explanation for it, so I am going to withdraw 100-J.

Mr. Newcomb: Well, your Honor, I think we have done everything we can to satisfy the Court.

The Court: Well, I have had briefs on both sides, and it is a close question, I think, but in the interest of justice I think that I should withdraw it.

Mr. Newcomb: Your Honor, if Schwimmer had never been a defendant it would be admissible.

The Court: Yes, but he is a defendant and he is not dead, and it doesn't correspond with the facts that you have introduced in the case" (Tr. 2881-2882).

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"The Court: We have a peculiar situation in this case, because of the absence of Schwimmer" (Tr. 2883).

• • • • • • • •

"The Court: It's given me a lot of concern, Mr. Newcomb, and I think the safest course is to exclude it.

Mr. Margiotti: I think the worst thing about it is it occurred two months before the alleged transaction.

The Court: That isn't the reason I am excluding it. I am excluding it because of the peculiar situation that this case now presents" (Tr. 2883).

• • • • • • • •

"The Court: I have an instruction here withdrawing it and I intend to give that instruction.

Mr. Newcomb: Well, all I can say is that I have done my best and I apparently have not persuaded the Court.

The Court: I have done my best, too. It is hard to find the answer" (Tr. 2884).

• • • • • • • •

"Mr. Newcomb: You see, what I am also afraid of, it leaves us in this position. We will get, of course, a motion for a mistrial by both defendants.

Mr. Margiotti: Not based on that.

Mr. Newcomb: It isn't proper for me to ask for any concession, but certainly what I would do if I represented the defendants, and they are in a position where we have to go to the jury without it and have no right of appeal, no right of review, and I could say more, except that I sincerely——

The Court: Of course, that isn't all your evidence; it's just one scrap of evidence. It is a very poisonous piece of evidence" (Tr. 2884-5).

• • • • • • • •

"The Court: That's what I am worried about is the final sentence, it would mislead the jury as to what the balance of that money would be used for. You draw one conclusion and the defendants have no opportunity to show that that conclusion is an erroneous one. The last line of it, 'balance to be paid on case being dropped,' as I recall it. It doesn't say who to" (Tr. 2885).

• • • • • • • •

"The Court: I don't know that piece of evidence is admissible under the law" (Tr. 2886).

• • • • • • • •

"The Court: I will think about it a little further" (Tr. 2888).

Upon reconvening after the noon recess the Court said:

"The Court: I have reread your briefs on 100-J during the noon hour. I am not satisfied, but I am going to leave it in the record. I think it is a very doubtful question, but I am going to leave it in the record.

I spent the noon hour going over your briefs again. Your cases are not on conspiracy and the Government's are, but it is still a question that gives me a lot of concern, so I think that is the best thing to do about it" (Tr. 2912).

The Log of Oliphant's Telephone Calls Admitted in Evidence.

There was a certain log or supposed record of telephone conversations kept by the secretaries of Charles Oliphant, Chief Counsel of the Bureau of Internal Revenue, that was admitted into evidence. This log was made by secretaries who would listen into telephone conversations, without the knowledge of the other party on the line, and make stenographic notes of these conversations and type them within a day or two (Tr. 548, 549, 570-1). The District Court admitted proof of this telephone log over the petitioner's objection that it was not the best evidence and was hearsay (Tr. 542, 582, 683-4). This evidence was admitted notwithstanding the fact that Oliphant was present in the courtroom, in response to a government subpoena, and was not called as a witness (Tr. 567, 806). This log might have been used by Oliphant to refresh his recollection, but certainly was not competent in the form and manner in which it was put into the record.

Proceedings After the Trial.

At the conclusion of all the evidence petitioner filed a motion for a judgment of acquittal on the principal ground that the evidence was insufficient, and renewed his motion for a mistrial (R. 115-118, Tr. 2888). The District Judge stated from the bench: "Let the record show ruling reserved on the motion" (Tr. 2888).

After the jury's verdict against petitioner (R. 118), within the time allowed by the rules, he filed a motion for a judgment of acquittal or in the alternative for a new trial (R. 119).

These motions were set for hearing on July 19, 1956 (Tr. 3202), and on July 7 Judge Hulen, who tried the case, took his own life. Prior to this time, without the knowledge of petitioner, Judge Hulen, who was a patient of Dr. James M. Haddock, a psychiatrist, was being administered the strong hypnotic drug, paraldehyde, to "tide him over" during the trial, which had failed to relieve the deep depression with which he was suffering, and on the day of his tragic death was scheduled to enter a hospital for electric shock treatment (R. 142-153). The petitioner had no information about Judge Hulen's condition of health or mind throughout the trial until after he lost his life by a self-inflicted pistol wound. The Trial Judge was no doubt greatly disturbed during this long trial by the repeated references to suicide.

Shortly following Judge Hulen's death the Honorable Gunnar H. Nordbye, United States District Judge of the District of Minnesota, was appointed as Successor Judge under Rule 25 of the Federal Rules of Criminal Procedure (R. 127).

Within three days after Judge Nordbye's appointment, petitioner filed a supplemental motion for a new trial on the ground that the determination of pending motions, rulings on which had been expressly reserved by the Trial Judge (Tr. 2888, 2910), could only be disposed of by a judge who had "the feel of the case" and on the ground of newly discovered evidence with respect to the failure of two jurors to answer pertinent questions upon their *voir dire* examination (R. 127), which was elaborated on in a second supplemental motion, supported by affidavits showing that two lady members of the jury failed in response to questions of the Trial Judge to disclose their political affiliations and activities (R. 134), while other members of the jury panel who disclosed their political affiliations were excused for that reason.

These pending motions were heard by the Successor Judge and overruled by him (R. 142, Tr. Vol. I, 507-544, App. pp. 43-83).

On March 4, 1957, petitioner filed a third supplemental motion, supported by affidavits, on the ground of newly discovered evidence, to the effect that Judge Hulen had been under treatment of doctors, one a psychiatrist, for a long period of time and that during the trial of this case he was not in proper physical or mental condition to try a case of this importance involving the liberty of petitioner and his co-defendant; that he was to enter the hospital on the day of his death; that his death appeared to have resulted from a self-inflicted pistol wound; that a few days prior to taking his own life, while he was considering motions then pending, he expressed an inability to concentrate on the preparation of an opinion which he knew was expected of him, *and expressed doubt as to the guilt of petitioner and his co-defendant, Connelly, in that he stated with reference to Connelly: "Connelly was a glad hander and a greeter, and had done nothing more than I might have done had I been in his situation," and in respect to petitioner that he was ". . . a public servant who was careless and that might have been the reason for his conviction"* (R. 142-153).

Judge Nordbye, who had never seen these defendants or heard them testify, heard and overruled these motions the following day and sentenced petitioner to two years in the penitentiary and fined him $2500.00 (R. 153). Notice of appeal was immediately filed (R. 154) and the record filed within time in the Court of Appeals. On November 15, 1957, the Court of Appeals filed its opinion by Chief Judge Gardner, Judges Vogel and Van Oosterhout participating (R. 167-184), and entered its judgment (R. 185). A petition to rehear was filed (R. 186-202) and denied (R. 203); a stay of mandate issued (R. 204); and the record has been certified for use in this Court (R. 205) and this Court

has by order entered December 30, 1957, extended the time for the filing of the petition for a writ of certiorari in this case until and including January 23, 1958. A copy of the opinion of the Court of Appeals is appended to this petition as Appendix A, supra, p. 43.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The questions presented herein will be discussed separately:

1. Petitioner was deprived of the fair trial guaranteed by the Fifth Amendment to the Constitution of the United States because the Court of Appeals held that after the death of the District Judge who tried the case, a Successor Judge, who heard none of the proof and had not seen and observed the petitioner on the witness stand, passed upon pending motions for a judgment of acquittal, a mistrial and a new trial, and imposed sentence upon petitioner, all of which required "the feel of the case."

This case presents, we submit, an unprecedented situation. Seventy-two witnesses testified in this case, forty-eight for the Government, thirteen for Connelly, and eleven for petitioner, resulting in a transcript of about 3200 pages, and in addition over 200 exhibits comprising more than 1000 pages. The Successor Judge recognized the difficulties presented, in that he referred to the case as one which "involved so many days for trial," which "presented a difficult problem for a jury," and which "raised troublesome and substantial questions of law" (Tr. Vol. I, 507-544, App. pp. 48-83).

Judge Hulen had expressly reserved his decision on (1) petitioner's motion for a judgment of acquittal and for a mistrial made at the conclusion of all the evidence (R. 118, Tr. 2888), and (2) petitioner's motion for a judgment of acquittal or in the alternative for a new trial (R. 119),

which Judge Hulen had set down for argument, but before the argument of which he took his own life. Under these circumstances, Judge Nordbye, who heard none of the testimony and did not see the witnesses, including petitioner, on the witness stand, so as to have been able to observe their manner and demeanor, assumed to dispose of all these important questions on a cold record not in the performance of the prerogatives of a trial judge, but actually as an appellate judge.

The Successor Judge in his opinion said:

> ". . . although Judge Hulen did not make a specific ruling on defendants' motion for acquittal or for mistrial at the close of the case, it is evident that in effect he denied these motions by proceeding to present the matter to the jury. Any oversight in failing to make a formal ruling thereon cannot be considered as a reservation of ruling in light of the Trial Court's proceeding with the trial as the record reflects" (App. pp. 44-45).
>
> "In view of Judge Hulen's apparent disposition of the motions for judgment of acquittal, I am not disposed to discuss that question" (App. p. 45).

This observation of the Successor Judge was in square conflict with the record. What actually took place was that Judge Hulen stated at the close of all the evidence in the case, when the motions were argued, "Let the record show ruling reserved on the motions" (Tr. 2888).

When the jury was brought in for the argument of the case, the following took place:

> "Mr. Margiotti: You reserved your ruling on motions for judgment of acquittal?
>
> "The Court: Yes. Bring the jury in" (Tr. 2910).

The effect of this ruling of the Successor Judge was to deprive the petitioner of the provisions of Rule 29 (b) of the Federal Rules of Criminal Procedure, Expressly Au-

thorizing the Trial Judge to "reserve decision" on a motion for judgment of acquittal until after the verdict of the jury.

Earlier in the trial, when a mistrial was granted as to Schwimmer, Judge Hulen said:

> "I mean, since it was necessary that the defendant Schwimmer be—the case go forward without him, and I am deeply conscious of the fact there is a serious question in the case, but I am not convinced that a mistrial should be granted as to the other two defendants. My present position is to let the case proceed and if there should be a conviction, then have time to give it the study it deserves" (Tr. 2208).

Contrary to the assumptions of the Successor Judge, which the Court of Appeals disposed of very lightly, the petitioner has been deprived of what we regard as a constitutional right under the circumstances of this case to a trial and determination of this case by a jury and a trial judge who presided over the trial.

In undertaking to justify its decision the Court of Appeals said:

> "The Government's testimony tended to prove certain business transactions between Schwimmer and appellants by which the appellants profited, the payment of large sums of money by Sachs to Schwimmer, entries in books of Schwimmer indicating disbursement of sums of money on behalf of appellants, evidence that Schwimmer had purchased for appellant Connelly two suits of clothes, and evidence of visits by Schwimmer to and consultations with the appellants at various times. This general characterization of this testimony indicates that it was in the nature of circumstantial evidence by the government furnishing the basis for inferences by the jury and it was not disputed by appellants but their testimony went to either their lack

> of knowledge or other explanations of the transactions proven by the government. In these circumstances there was not much to be gained by hearing the testimony of the witnesses and observing their demeanor that could not be gained by reading the testimony and we think Judge Nordbye did not abuse his judicial discretion when he determined, as he manifestly did, that he could perform the duties to be performed by the presiding judge after verdict" (App. p. 89).

On the contrary, there was a square conflict in the evidence in that it was testified by petitioner and otherwise proven (1) that he had no voluntary business transactions with Schwimmer, but that Schwimmer purchased the oil royalties in his name without his knowledge and consent; (2) the statement made by the Court of Appeals, insofar as petitioner is concerned, that he "*profited*" is in the very teeth of the evidence, as virtually admitted by counsel for the Government in the argument in the Court of Appeals, that the petitioner did not receive a cent; and (3) a large part of the evidence, insofar as the petitioner is concerned, was taken up with the question of whether or not he made a correct and honest decision in determining not to prosecute the Sachs case, or whether or not his decision in this respect was unjustified by the facts and corrupt. Petitioner's decision not to prosecute Sachs was supported by the statements of nine eminent doctors who examined Sachs and differed in by only one doctor, who did not testify, who said in a letter that Sachs had epilepsy, but that the chances of his prosecution being fatal were "remote indeed." There was nothing circumstantial about this evidence and petitioner was entitled to have it passed upon by a *well* judge, who heard the witnesses and observed their manner and demeanor and not by a judge far removed from the scene of the trial, who could act only in an appellate capacity. It is unthinkable that a defendant in a criminal case can be deprived of his liberty under such circumstances as these.

The Court of Appeals in support of its opinion cites the case of *Meldrum v. U. S.* (C. A. 9, 1907), 151 F. 177. This case is quoted from in the opinion of the Court of Appeals (App. p. 90), but in quoting from the opinion a significant statement is left out of the heart of the quotation. Just before the second portion of the opinion quoted appears the Court said in the Meldrum case:

> "It appears, moreover, that on presenting the motion for a new trial counsel for the plaintiff in error expressly waived reliance on any ground of motion for a new trial, save and except the death of the judge before whom the case was tried, after the rendition of the verdict and while the motion for a new trial was pending."

Thus it will be noted that in the Meldrum case no substantial questions were raised; whereas in this case we raise the question of the judge who tried the case having reserved action on a number of important motions, particularly petitioner's motions for a mistrial, for a judgment of acquittal and for a new trial. The Court of Appeals in quoting only from the Meldrum case left out of its quotation the significant statement that "the plaintiff in error expressly waived reliance on any ground of motion for a new trial, save and except the death of the judge before whom the case was tried, after the rendition of the verdict and while the motion for a new trial was pending."

The Court of Appeals also cites the cases of *Chin Wah v. U. S.* (C. A. 2, 1926), 13 F. 2d 530; *King v. U. S.* (C. A. 6, 1928), 25 F. 2d 242; *Owens v. Hunter* (C. A. 10, 1948), 169 F. 2d 971; *McIntyre v. Modern Woodmen of America* (C. A. 6, 1912), 200 F. 1; *Pessagno v. Euclid Inv. Co.* (D. C. D. C., 1940), 35 F. Supp. 743, and *U. S. v. Green* (S. D. Ill., 1956), 143 F. Supp. 442. These cases do not support the text of the opinion.

In *Chin Wah v. U. S.*, supra, the introduction to the opinion simply states: "Judge Garvin, who tried the case, re-

signed before sentence, and Judge Inch imposed sentence in his place." The Court held that "the sentence was lawful." There was no question about the Trial Judge having reserved action on any motions and the only thing that remained for the Successor Judge to do was to impose sentence.

In *King v. U. S.*, supra, the question raised was largely based on the proposition that the District Court lost jurisdiction by postponing sentence. The Court did hold that the "Trial Judge having died after verdict, it was also competent for his successor in office to pass upon the motion for a new trial and to allow the bill of exceptions." No question was considered, as in the instant case, that the judge who tried the case had reserved action on important and determinative motions.

In the case of *Owens v. Hunter*, supra, the Court said: "And while ordinarily sentence should be imposed by the judge before whom the conviction was had, where there are two judges of the same court with concurrent jurisdiction, a judgment is not void merely because the trial was before one of the judges and the sentence was imposed by the other." Thus it will be seen that there were no pending motions in that case that were left undisposed of by the Trial Judge, but only the matter of sentence.

In the case of *McIntyre v. Modern Woodmen of America*, supra, the only question involved was the matter of signing the bill of exceptions.

In the case of *Pessagno v. Euclid Inv. Co.*, supra, a civil case, the District Court said, in passing upon an alternative motion for a new trial in a case that was tried by a judge then deceased: "At the oral hearing of the motion for a new trial counsel stipulated that I might consider a transcript of record filed in the United States Court of Appeals for the District of Columbia upon the appeal of the case

above referred to and upon the reading of such transcript I find what appears to me is a sufficient statement of the character of the evidence to permit me to pass upon the motion." There was no question in this case about the District Court's authority to pass upon the motion for a new trial, but, on the contrary, it was stipulated that he might consider the motion on the transcript of the record.

In the case of *United States v. Green*, supra, the judge trying the case passed on the motion for a new trial and judgment of acquittal after a reversal of his action in sustaining a motion in arrest of judgment. A successor judge sentenced the defendant. The successor judge said: "If this court were to again consider these motions it would be acting as a court of review." We insist that Judge Nordbye acted as a court of review without the petitioner having the benefit of Judge Hulen's decision on his motions for a mistrial, judgment of acquittal, and a new trial, and that certainly this case is no authority for the decision of the Court of Appeals in the instant case.

On the basis of these cases and no others the Court of Appeals has swept away the petitioner's constitutional right to a fair and impartial trial under the Fifth Amendment with the statement, "We conclude that the contention that Judge Nordbye was disqualified to perform the duties to be performed by the presiding judge after verdict, is without merit" (App. p. 90).

Judge Nordbye said, in the course of his opinion, "In view of Judge Hulen's apparent disposition of the motions of judgment for acquittal, I am not disposed to discuss that question" (App. p. 45). Hence it appears that since Judge Hulen reserved judgment on this and other motions, that both judges failed to exercise the discretion required of them in passing on these motions. See, e. g., *United States ex rel. Accordia v. Shaughnessy* (1954), 347 U. S. 260, 98 L. Ed. 681; *Mastropasqua v. Shaughnessy* (C. A. 2,

1950), 180 F. 2d 999; *Acosta v. Landon* (D. C. Col., 1954), 125 F. Supp. 434, 441; cf. *Schwab et al. v. Coleman* (C. A. 4, 1944), 145 F. 2d 672.

The Successor Judge Abused His Discretion in Overruling Petitioner's Motion for a New Trial.

Actually the Successor Judge, as heretofore indicated, did not rule upon petitioner's motion for a judgment of acquittal and mistrial pending at the time of Judge Hulen's death, but his ruling on petitioner's motion for a new trial had the same effect and amounted to an abuse of discretion.

In *Brennan v. Grisso* (C. A. D. C., 1952), 198 F. 2d 532, the District Judge ruled that: "The bill of complaint is dismissed," but died before filing findings of fact or conclusions of law. The Court of Appeals for the District of Columbia in passing on this question under Rule 63, Federal Rules Civil Procedure, which is similar to Rule 25, Federal Rules Criminal Procedure, said:

> "• • • The Rule thus shows a generous attitude toward a new trial when the trial judge dies before the case is disposed of.
>
> "We do not know whether Judge Goldsborough would have denied the motion of June 15 or, in the light of the additional evidence it offered, would have changed his previously expressed views regarding appellant's domicile. Because he had heard the witnesses he was better qualified than another judge to determine the credibility and weight of the evidence, and appellant's motion might have had more significance to him. In view of these considerations, we think Rule 63 should not be interpreted so broadly as to dispense with the necessity of a new trial upon the death of the trial judge" (l. c. 532-3).

Also, in the case of *Federal Deposit Ins. Corp. v. Siraco* (C. A. 2, 1949), 174 F. 2d 360, a civil case tried without a

jury, the Court of Appeals in reversing a successor judge said:

> "As to this item Judge Kampf decided for the defendant on the weight of the evidence. It is true that the testimony of Siraco and Lamoureux, if believed, will support a finding that the deposit was made, but Judge Kampf did not see the witnesses and consequently he was in no better position to pass upon their credibility than we are" (l. c. 363).
>
> • • • • • • •
>
> "Under these circumstances we think that the finding as to the $1077.50 deposit should be reversed and a new trial awarded before a judge who can decide after seeing the witnesses" (l. c. 364)

The reasoning of these cases apply with a great deal more force to a criminal case in which, as Judge Hulen said, "intent is the gist of this case" (Tr. 2893), especially in view of the length of the record in the case and the importance of the manner and demeanor of the petitioner and other witnesses in weighing their testimony.

The Successor Judge Acted as an Appellate Court.

The Successor Judge stated in his opinion: "No doubt an appeal will be taken and the Appellate Court will have the same opportunity as this court to determine whether or not Judge Hulen should have granted a judgment of acquittal or whether or not, in the alternative, on the entire record, a new trial should have been granted" (App. p. 45). This statement indicates very clearly that the Successor Judge approached his ruling on the pending motions as an appellate judge and not as a trial judge, thus depriving petitioner of the exercise of discretion vested in the judge trying the case.

This Court, in *Cone v. West Virginia Pulp and Paper Co.* (1947), 330 U. S. 212, 91 L. Ed. 849, said:

> "Determination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. * * * Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without the delay, expense or other hardships of an appeal' " (l. c. 216).

The decision of the Court of Appeals in affirming this case, particularly as respects the Successor Judge's abuse of discretion in passing upon petitioner's motion for a new trial, including the other pending motions, does violence to, and is in conflict with, a number of other decisions of courts of appeal. *Friedman v. United States* (1952), 200 F. 2d 690, 697; *Dolan v. United States* (1955), 218 F. 2d 454, 460; *Yutterman v. Sternberg* (1936), 86 F. 2d 321; *Taylor v. United States* (1927), 19 F. 2d 813, 817; *Freeman v. United States* (C. A. 2, 1915), 227 F. 732.

The Trial Judge should act as a thirteenth juror. *Applebaum v. United States* (C. A. 7, 1921), 274 F. 43, 46; *Rees et al. v. United States* (C. A. 4, 1938), 95 F. 2d 784, 791.

The Court of Appeals also erred in affirming the action of the Successor Judge in sentencing the petitioner, whom, as far as known, he never saw, and certainly did not see and hear on the witness stand. *Morgan v. United States* (1938), 304 U. S. 1, 19, 82 L. Ed. 1129; *Yates v. United States* (C. A. 9, 1955), 227 F. 2d 844, 846-7.

The importance to the administration of criminal justice of the question of whether or not a successor judge should have passed upon petitioner's motions for a mistrial, a judgment of acquittal and a new trial, cannot be over-

emphasized. *This Court, as far as we have been able to find, has never construed Rule 25, Federal Rules of Criminal Procedure, and has never determined in any reported decision how far that rule should be extended.* Certainly it was never intended by the promulgation of this rule to destroy the historic concept that a defendant is entitled to be tried "by one jury and one judge." It is important to the administration of criminal justice that this Court determine whether in this or similar cases Rule 25, Federal Rules of Criminal Procedure, should permit a successor judge to overrule important motions on which rulings had been expressly reserved by the trial judge, and to sentence the defendants, whom he had never seen, thus depriving them of due process.

2. The Court of Appeals erred in affirming the action of the Successor Judge in denying petitioner's motions to dismiss the indictment and suppress evidence obtained from petitioner and his co-defendant in their grand jury interrogation without their being advised that an indictment against them would be sought in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States.

Petitioner was required by subpoena to testify before the Grand Jury on November 21, 22 and 29. On November 21 and 22 the petitioner was "a probable defendant." The preparation of an indictment against him commenced on November 22, 1955, and was completed that evening. The Trial Court suppressed the testimony given by the defendants after November 22, 1955 (R. 52), but admitted testimony before that date, and particularly admitted certain documents obtained from petitioner at his home in Wadesboro, North Carolina, on November 23, 1955, as a result of petitioner having been asked to produce these documents before the Grand Jury. Briefly, the Government obtained as a result of the grand jury testimony of

petitioner, during which he was not sufficiently warned of his constitutional rights, and not warned that he was a prospective defendant, the testimony of petitioner on November 21, 1955 (Tr. 2772-3, 2775, 2861-2), which the prosecutors used to attempt to impeach petitioner concerning his conversation with Turner Smith about when the oil transactions took place (Tr. 2772-3, 2775); an original letter from Schwimmer to petitioner dated April 16, 1951, about the oil royalty deed (Exs. 120, 123, Tr. 1995); a copy of letter from petitioner to Schwimmer dated April 19, 1951 (Ex. 122, Tr. 1995); Exhibit 114, a "fragment of paper" on which appeared the name of Dr. Cruvant, which the prosecutor rather spectacularly used to indicate that Schwimmer knew in advance that the question of Sachs' physical condition would be referred to St. Elizabeth Hospital, where Dr. Cruvant was on the staff (Tr. 2941, 2972-3); original letter from Schwimmer to petitioner dated August 4, 1951 (Ex. 106, Tr. 1376-8), quoted in full by the Successor Judge (App. p. 68); original letter from Schwimmer to petitioner dated September 8, 1950 (Ex. 107, Tr. 1381), quoted in full in the Successor Judge's opinion (App. p. 70); copy of letter from petitioner to Schwimmer dated September 6, 1950 (Ex. 144, Tr. 1644), quoted in full in the Successor Judge's opinion (App. p. 69); letter from Caudle to Morgan dated November 15, 1950 (Ex. 183, Tr. 2862); copy of letter from Caudle to Gayle Cooper dated January 23, 1951 (Ex. 184, Tr. 2062); copy of letter from Caudle to Schwimmer dated May 18, 1951 (Ex. 185, Tr. 2862); copy of letter from Caudle to Frank Nathan dated May 21, 1951 (Ex. 186, Tr. 2862); copy of letter from Caudle to Schwimmer dated June 1, 1951 (Ex. 187, Tr. 2862); copy of letter from Caudle to Rothwacks dated September 20, 1951 (Ex. 188, Tr. 2862); and a deposit slip of City Bank dated March 5, 1951, showing a deposit of a royalty check of $60.63 (Ex. 143, Tr. 1557), which petitioner cashed and gave the proceeds to Schwimmer.

All of this evidence was apparently relied on heavily by the jury because the jury called for all letters to Caudle from Schwimmer and to Schwimmer from Caudle during their deliberation (Tr. 2169) and were commented on by the Successor Judge in his opinion.

The use of this evidence amounted to a denial of petitioner's constitutional rights. *The danger of requiring a prospective defendant to testify before a grand jury is apparent.* In some jurisdictions the effect is to give persons so testifying immunity. This Court should determine how far the practice of pre-trying a prospective defendant before a grand jury should be permitted. Certainly the Trial Judge, the Successor Judge, and the Court of Appeals went too far under well-defined principles of constitutional protection against self-incrimination in admitting this evidence.

3. The Court of Appeals erred in affirming the action of the Trial Judge and Successor Judge in overruling petitioner's motions for a severance and for a mistrial after a mistrial was granted as to his co-defendant Schwimmer.

A mistrial was granted in this case as to the defendant Schwimmer after the trial had been in progress for more than two weeks (Tr. 1486, 1535). Certain evidence was admitted as to Schwimmer, but held inadmissible against petitioner and his co-defendant, including conversations between Shifrin, Sheffrey and Sachs, and between them and Schwimmer (Tr. 306, 814, 819); telephone calls from Schwimmer to Oliphant (Ex. 54, Tr. 584-585); (Ex. 56-A, Tr. 586-587); telephone conversation between Sheffrey and Schwimmer (Tr. 873); and conversation between Schwimmer and Dean (Tr. 1249, 1253-1256). Certain of these conversations have been referred to in more detail herein in our "Statement of the Case." The Trial Judge expressed uncertainty about the petitioner's motion for a mistrial (Tr.

1547) and said that this motion "presented such a serious question" that he would "let the case proceed and if there should be a conviction, then have time to give it the study it deserves" (Tr. 2208-2209). Unfortunately, the District Judge took his own life before he could further consider this motion. The Court of Appeals, including its discussion of this question, said "the motion for mistrial as to the appellants because of the severance of Schwimmer by the Court's declaration of mistrial as to him was under the circumstances here disclosed addressed to the sound judicial discretion of the Trial Judge and we think this discretion was wisely exercised in denying appellants' motions" (App. p. 94). The Court of Appeals completely overlooked the fact that the Trial Judge never did finally pass upon this motion. While the Trial Judge instructed the jury in general terms not to consider this evidence, we think the observation of Mr. Justice Jackson in *Krulewitch v. United States* (1949), 336 U. S. 440, 453, 93 L. Ed. 790, that "the naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction," is particularly applicable to this case.

4. **Petitioner's constitutional rights were violated by the order of the District Judge (affirmed by the Court of Appeals) that the case be tried by a jury selected from a panel from certain designated rural counties of the Division, to the exclusion of St. Louis and St. Louis County, and by the concealment by two jurors who tried the case of certain important facts relative to their qualifications as jurors.**

The District Judge entered an order directing that the jury panel in this cause be drawn from certain rural counties of the Division to the exclusion of the City of St. Louis and County of St. Louis (R. 133-4). The effect of this order was to exclude 80% of the population of the Division (Tr. 3212-3213). The effect of this exclusion was to deny the petitioner a jury consisting of "a body truly repre-

sentative of the community." *Smith v. Texas* (1940), 311 U. S. 128, 130, 85 L. Ed. 84, 86; *Thiel v. Southern Pacific Co.* (1946), 328 U. S. 217, 90 L. Ed. 1181.

The Court of Appeals undertook to justify the action of the District Court on the basis of Section 1865 (a), Title 28, U. S. C., but we submit that it was never intended that this code section should be so interpreted as to deprive a defendant of a panel selected from a "cross-section of the community," thereby excluding from the jury panel the population of a large metropolitan area. This method of limiting the geographical area from which a jury is selected is in conflict with the cases of *United States v. Gottfried et al.* (C. A. 2, 1948), 165 F. 2d 360, cert. den. 33 U. S. 860; *United States v. Titus* (C. A. 2, 1954), 210 F. 2d 210; *United States v. Klock et al.* (C. A. 2, 1954), 210 F. 2d 217, 220, cert. den. 347 U. S. 960; *Gariepy v. United States* (C. A. 6, 1955), 220 F. 2d 252, cert. den. 350 U. S. 825; and *United States v. Standard Oil Co.* (D. C. Ill., 1909), 170 F. 988.

Moreover, two of the jurors, Mrs. Grace Hoffman, whose son, Bob Hoffman, with whom she was living (Tr. Vol. II, 31, also 3236) and who was Treasurer of the Republican County Committee (Tr. 3240, 3244); and Mrs. Goldie Brown failed to answer truthfully by raising their hands when the following question was propounded by the Trial Judge:

> "The Court: Do either of you or are any members of your family affiliated or hold membership or office—we have covered county committees, but sometimes there are Democratic and Republican organizations separate from the committee, and sometimes Democratic clubs and Republican clubs? To your knowledge, are you or any member of your family any members of such club or organization? If so, raise your hand" (Tr., Vol. II, 44, 45).

Both of these ladies, after failing to raise their hands, served on the jury. They were both residents of Mont-

gomery City. Both of them had been members of the Township Women's Republican Club in 1953, 1954 and 1955 (Tr. 3233, 3235, 3237); and Mrs. Brown was on a committee of that club (Tr. 3234). Both of them served as Republican Judges at political elections by appointment of the County Court in 1952 and 1954, upon recommendation of the Republican County Central Committee (Tr. 3241-2, 3245-6).

These facts were not known to the petitioner until after the trial when they were raised in his second supplemental motion for a new trial on the ground of newly discovered evidence (R. 134-141), and evidence was offered before the Successor Judge supporting the motion (Tr. 3228-3248). The Court of Appeals undertook to sustain their opinion in this case by simply quoting from the opinion of Judge Nordbye, in which he found that: "The record is bereft of any showing that there was fraudulent conduct on the part of these jurors" (App. pp. 97-98).

The political affiliations of the jurors, as recognized by the question of the Trial Judge, were particularly important in view of the terrific publicity pointing up the political significance of this trial (Tr. 4283, 4286, 4293). Innumerable, hostile, political columns of local newspapers, the script of local radio stations, as well as the script of local T. V. stations, were introduced establishing that the petitioner was in a storm of political prejudice.

The opinion of the Court of Appeals in this respect is in conflict with the decisions of other Federal courts and courts of last resort of several states and encyclopedic works. *Clark v. United States* (1933), 289 U. S. 1, 77 L. Ed. 993; *Carpenter v. United States* (C. C. A., D. C., 1938), 100 F. 2d 716, 717; *Hyman v. Eames* (Ct. Ct. Colo., 1890), 41 F. 676; *Wilson v. Clement* (Ct. Ct. Vt., 1903), 126 F. 808, aff'd 155 F. 1021; *State v. Herman* (Mo. Sup., 1955), 283 S. W. 2d 617; *People v. Dettaven* (1948), 321 Mich.

327, 32 N. W. 2d 468; *Springdale Park v. Audristis* (1954), 30 N. J. Sup. 257, 104 A. 2d 327, 330; *Crutcher v. Hicks* (Ky. App., 1953), 257 S. W. 2d 539, 540; *Texas Employers' Ins. Assn. v. Wade* (Tex., 1946), 197 S. W. 2d 203, 209-210; *Shipley v. Permanente Hospitals* (1954), 127 Cal. App. 2d 424, 274 P. 2d 53, 57; 39 Am. Jur., New Trial, Sec. 70, pp. 84, 87, Sec. 45, p. 65; 23 C. J. S., Criminal Law, Secs. 1446-1449.

5. The Court of Appeals erred in affirming the action of the Trial Judge and Successor Judge in admitting Exhibit 100-J and in admitting the Oliphant telephone log.

Exhibit 100-J.

The Government introduced in evidence a highly prejudicial exhibit in the form of a memorandum, in Schwimmer's handwriting, taken from his files that were stored in a warehouse, and on the page designated "Oct-49" appears the following"

"Shu-Styles	$10,000
Pd out Oil Royalty M. C.	4,200
Held in Escrow to be paid out depending on whether I. Sachs case is dropped."	$ 5,800

This page was separated from other pages in the book, which were excluded, and filed as Government's Exhibit 100-J (Tr. 2912; text 4090). The testimony of Schwimmer's secretary showed that it was in Schwimmer's handwriting (Tr. 1168-1173, 1223-6, 1241, 1368). The Government recognized that this exhibit was essential to a conviction (Tr. 2884). Judge Hulen referred to it as "a very poisonous piece of evidence" (Tr. 2885).

The Trial Judge had grave doubt about the admissibi ity of this evidence, but finally admitted it, with the following statement:

"I am not satisfied, but I am going to leave it in the record. I think it is a very doubtful question, but I am going to leave it in the record. I spent the noon hour going over your briefs again. Your cases are not on conspiracy and the Government's are, but it is still a question that gives me a lot of concern, so I think that is the best thing to do about it" (Tr. 2912).

The Successor Judge justified the admission of the exhibit by saying:

"It is not disputed that the entry was made by Schwimmer during the existence of the alleged conspiracy * * *" (App. p. 79).

Actually there is no evidence as to when the entry was actually made. Obviously, it was not made in October, 1949, as the designation of the page indicated, because Schwimmer did not pay out $4200.00 for an oil royalty for "M. C." in October, 1949, but purchased this oil royalty on December 30, 1949, not for $4200.00, but for $3600.00.

Furthermore the check referred to from Shu-Stiles to Schwimmer of $10,000.00 was dated October 12, 1949, which was two weeks before Schwimmer had his first conference with petitioner on October 26, 1949.

There is no evidence connecting petitioner with this exhibit in any way, but its admission was highly prejudicial to petitioner because it was argued that the $5800.00 held in escrow "to be paid out depending on whether I. Sachs case is dropped" formed a basis for the groundless assumption that petitioner was to receive part of this money. *There is no evidence in the record that petitioner received one single cent of this or any other money as a result of this transaction.* There cannot be found in the record one shred of evidence that petitioner received anything from Schwimmer but two Christmas cards and one Easter card. Never did petitioner have one meal with Schwimmer and

never was he alone with him (Tr. 2680-2684). Schwimmer was a personal friend of the President of the United States, General Counsel to one of the president's closest advisers, Tom Evans, and for many years a friend of Matt Connelly. Because of the firm friendship between Schwimmer and these prominent persons and Schwimmer's severe heart condition, petitioner accepted Schwimmer's apology and tolerated him for no other reason as petitioner testified (Tr. 2672-3, 2678).

Schwimmer was the only person known to petitioner who could prepare a deed to be signed and the only source for the description of the property to be embraced on a conveyance (Tr. 2691). The Court should take judicial notice that all conveyances of realty in Oklahoma are indexed as section A, plats and descriptions and are not indexed in the names of grantors or grantees.

The Court of Appeals undertakes to justify the admission of this exhibit largely by quoting from the opinion of the Successor Judge (App. p. 103). The exhibit, which is a narrative statement of a past transaction, was inadmissible, and the decision of the Court of Appeals that it was admissible is in conflict with the opinions of other courts of appeal. *Harrington v. United States* (C. A. 8, 1920), 267 F. 97, 103; *Van Riper et al. v. United States* (C. A. 2, 1926), 13 F. 2d 961, 957; *United States v. Goodman* (C. A. 2, 1942), 129 F. 2d 1009, 1013; *United States v. Guido et al.* (C. A. 3, 1947), 161 F. 2d 492; *Mayola v. United States* (C. A. 9, 1934), 71 F. 2d 65. Furthermore, the burden of proof was upon the Government to establish that the entry was made during the existence of and as part of the conspiracy, and there is no such evidence. The opinion of the Court of Appeals was, therefore, in conflict with *Krulewitch v. United States* (1949), 336 U. S. 440, 443, 93 L. Ed. 790; and *Fiswick v. United States* (1946), 329 U. S. 211, 217, 91 L. Ed. 196.

The Oliphant Log.

Oliphant, Chief Counsel for the Bureau of Internal Revenue, had his secretaries listen in to telephone conversations, without the knowledge of the other person talking, and make stenographic notes of these conversations, which were later transcribed (Tr. 548, 549, 570-1).

The Trial Court admitted six of these telephone calls between Schwimmer and Oliphant (Tr. 577; Text, Tr. 3969; Tr. 580; Text, Tr. 3970; Tr. 584; Text, Tr. 3974; Tr. 669; Text, Tr. 3975; Tr. 1406; Text, Tr. 3977; Tr. 586; Text, Tr. 3978); two conversations between Oliphant and Connelly (Tr. 582; Text, Tr. 3973; Tr. 1410; Text, Tr. 3980); and two conversations between Oliphant and petitioner (Tr. 589; Text, Tr. 3979; Tr. 2760; Text, Tr. 3982).

Oliphant, who was listed as one of the Government's witnesses (Tr. Vol. II, 21), was present in the courtroom but was not called as a witness (Tr. 567, 806). The petitioner objected to this evidence on the ground that it was not the best evidence and was hearsay (Tr. 542, 582, 683-4).

The Court of Appeals undertook to justify the admission of this evidence under the Federal Business Records Act, Section 1733 (a), Title 28 U. S. C. This log was not a record kept in the "regular course of business," as contemplated by the Act, because it was not made pursuant to any regulation or order of the Treasury Department; was kept entirely for the use of Oliphant to refresh his recollection of telephone conversations (Tr. 679); and was not open to inspection by others without his permission (Tr. 683). The practice of keeping this log was discontinued when Oliphant left office in December of 1951 (Tr. 558).

The admission of this log deprived petitioner of the right to cross-examine both Schwimmer and Oliphant, in that a mistrial was granted as to Schwimmer, and Oliphant was not offered as a witness.

The admissibility of this log is not supported by any authority which we have been able to find.

6. The Court of Appeals should have sustained petitioner's motion for a judgment of acquittal or a new trial because of the insufficiency of the evidence.

The evidence in this case is wholly insufficient to sustain a conviction of petitioner, because:

(1) Petitioner did not receive one cent from the oil transactions with Schwimmer or from any other source, but caused Schwimmer to send him a deed to sign, thereby severing his name from the mineral interest in Oklahoma in April, 1951, and title has been vested in Schwimmer ever since. The Government in fairness should admit this.

(2) Four government attorneys who testified as government witnesses, testified positively and unequivocally that there was nothing unusual or improper in the handling of the Sachs case; namely, Cunningham (Tr. 1274-5, 1278, 1314); Smith (Tr. 1767-8, 1789); Rothwacks (Tr. 1860), still a government lawyer, and Folsom (Tr. 2086-7).

(3) Nine eminent physicians, Drs. Llewellyn Sale, Assistant Professor of Clinical Medicine at the Washington University Medical School and on the staff of three hospitals in St. Louis; Dr. Irwin Levy, Assistant Professor of Neurology at the Washington University Medical School, Associate Neurologist at Barnes and Jewish Hospitals, and consultant to the Veterans Administration; Dr. N. W. Freund, who was on the staff of four St. Louis hospitals; Dr. Louis L. Tureen, Assistant Professor of Clinical Psychiatry and Neurology at St. Louis University School of Medicine, certified by the American Board of Neurology and Psychiatry, a former consultant to the Veterans Administration Association, member American Academy of Neurologists, the Central Neuropsychiatric Association, and the author of 25 publications in medical journals (Tr. 3681-2; Ex. 9-GG; Text, Tr. 3694-3695); Dr. Robert D.

Brookes, Assistant Professor of Neurology at the Washington University School of Medicine, on the staff of four hospitals in St. Louis, certified by the American Board of Psychiatry and Neurology, a member of the American Psychiatric Association and of the American Academy of Neurology; and a Board at St. Elizabeth Hospital in Washington, consisting of Dr. Silk, Acting Superintendent of the Hospital (Ex. 9-JJ, Tr. 369; Text, Tr. 3663, 3671, 3676); Dr. Bernard Cruvant, M. D. Washington University School of Medicine, formerly Assistant Professor of Psychiatry at Georgetown University, a Lieutenant-Colonel during the war, serving as head of the neurological and psychiatric sections, and as a consultant, formerly Chief of Psychiatry and Neurology at the John J. Cochran Veterans Hospital in St. Louis, Missouri, and formerly Associate Professor of Clinical Psychiatry at Washington University School of Medicine; Dr. Weickhardt and Dr. Tartaglino (Ex. 10-F, Tr. 3761), *all gave affidavits, interrogatories or testimony that Sachs was suffering with grand mal epilepsy, approaching status epilepticus, and that his prosecution would endanger his life and perhaps trigger his suicide. Caudle decided the question of Sachs' prosecution in view of his health entirely on the merits.*

(4) Judge Harper, who passed on the Sachs case after he was indicted, concurred completely in petitioner's finding on the health issue, and said:

> "* * * I personally am of the opinion that it is one of the most vicious violations that I have ever had before me. * * * I am not concerned with that phase of it at all, I will be perfectly and brutally frank with you, the only concern I have in this case is the fact that we have, do have in it, the most complicated medical problem of any case that I have ever had before me. It has been my policy, there is no secret about it, I have stated it from this bench a

number of times, that my policy in the income tax evasion cases is to sentence people to an institution except in the rare cases. * * * In this instance we have, of course, a very serious medical problem. We have a medical problem that the medical experts themselves cannot agree upon among themselves" (Ex. 155, Tr. 4180-81).

"* * * But in this particular instance, there is unanimity among all of them to the fact that the man is in a very serious condition. No question about that.

"There is some little dispute between some of them as to whether or not it would have the effect of possibly bringing on suicide or death * * *" (Tr. 4196-97).

"* * * I haven't any sympathy, don't misunderstand me, if he was healthy I would give him a substantial sentence, and I wouldn't have the least qualms about it, but in his particular case, *it is a very serious medical problem. I will say to you before you have him brought in, I am not going to have him put in an institution, I am not going to place him on probation. I am going to fine him* * * *" (Tr. 4197).

(5) The Trial Court withdrew from the consideration of the jury all charges in the indictment relating to the substantive offenses of bribery, perjury and knowingly making false statements and entries (R. 3130) at the conclusion of all the evidence so that this case hung only upon a charge of conspiracy. The petitioner had only two contacts with his co-defendant Connelly about this matter, consisting of two telephone conversations with reference to appointments (Tr. 2597-8, 2601). At all of petitioner's meetings with Schwimmer about this case, someone else in the Department was present, and a memorandum of every conference was made. The oil royalty purchased in the name of petitioner was purchased without his knowledge and consent, and he made repeated efforts to get it out of his name, which was finally accomplished.

The verdict in this case is not sustained by any material evidence and it is perfectly apparent that the petitioner has been the victim of a deranged or corrupt lawyer, Schwimmer, who escaped in the midst of the trial by a mistrial, leaving petitioner and his co-defendant standing alone in a highly prejudiced atmosphere.

(6) The petitioner arrived at his decision not to prosecute the Sachs case on account of Sachs' epilepsy, with which disease petitioner had had considerable experience (Smith, Tr. 1683-4; Cunningham, Tr. 1287; Weiffenbach, Ex. 140; Text, Tr. 4157; Caudle, Tr. 2624-6), and in accordance with the health policy of the Department of Justice inaugurated long before Caudle was put in charge of the Tax Division (Tr. 1654, 1688-9, 1786, 1843, 1845; Ex. 10-EEEE).

(7) There was never a meeting between the alleged coconspirators Connelly, Caudle and Schwimmer. Petitioner never saw I. Sachs, who was named in the indictment as a conspirator. The name of the other alleged conspirator, Ellis Slack, was finally stricken from the indictment. *There was no conspiracy.*

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated January 22, 1958.

C. ARTHUR ANDERSON,
722 Chestnut Street,
St. Louis, Missouri,
WALTER M. HAYNES,
Winchester, Tennessee,
JOHN J. HOOKER,
1106 Nashville Trust Building,
Nashville 3, Tennessee,
By JOHN J. HOOKER,
Counsel for Petitioner.

APPENDIX A.

ORDER DENYING MOTIONS OF DEFENDANTS FOR JUDGMENTS OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL.

The undersigned, on July 13, 1956, was assigned by Chief Judge Gardner, of the Eighth Circuit Court of Appeals, to the above-entitled action under Rule 25, Federal Rules of Criminal Procedure, by reason of the death of Judge Rubey M. Hulen, who presided at the trial of the defendants and before whom verdicts of guilty as charged in the indictment as to each of the defendants were returned by the jury impaneled therein. In said order of assignment, it is provided that the assigned Judge should "hear and determine all pertinent issues in said case and to perform all the necessary and appropriate duties to be performed to complete the trial of said action, with the same force and effect as if said acts and duties had been done and performed by * * * Rubey M. Hulen, now deceased, * * *."

There have been presented to me as such assigned Judge several motions of the defendants for judgment of acquittal, or in the alternative for a new trial, and supplemental motions for a new trial.

Mr. Jacob M. Lashly, Mr. John H. Lashly, and Mr. Paul B. Rava, of St. Louis, Missouri, appeared in behalf of defendant Matthew J. Connelly;

Mr. John J. Hooker, Mr. C. Arthur Anderson and Mr. Walter M. Haynes, of St. Louis, Missouri, appeared in behalf of defendant T. Lamar Caudle;

Mr. Harry Richards, United States Attorney, St. Louis, Missouri, and Mr. Wyllys S. Newcomb, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., appeared in behalf of the United States of America.

The verdicts of the jury were returned on June 14, 1956. Thereafter, on June 19, 1956, defendants Connelly and Caudle made a joint motion for acquittal, or in the alternative for a new trial. On July 7, 1956, Judge Hulen passed away. Thereafter a supplemental motion for a new trial upon the grounds of newly intervening facts and newly discovered evidence was filed on July 19, 1956. On August 2, 1956, in pursuance of an oral order of this Court, defendants were permitted, and did, file a second supplemental motion for a new trial on the grounds of newly discovered evidence. Briefs were thereafter filed and oral arguments were presented to this Court on December 18, 1956.

Defendants in their respective motions urged that at the time of Judge Hulen's death there were pending before him (a) separate motions for judgment of acquittal and for mistrial presented by these two defendants at the close of all the evidence in the case and as to which the court had reserved ruling; and (b) joint motion for judgment of acquittal or in the alternative for a new trial filed by these defendants on June 19, 1956, in which all motions theretofore filed by these defendants were asserted seriatim. At the outset, the defendants take the position that the consideration and determination of these motions is particularly within the province of the Judge who presided at the trial, who observed the witnesses, and who necessarily would have had the "feel of the case," as they expressed it, and which could not be imparted to one who merely reads the transcript and hears the arguments of counsel with respect to said motions. However, although Judge Hulen did not make a specific ruling upon defendants' motion for acquittal or for mistrial at the close of the case, it is evident that in effect he denied those motions by proceeding to present the matter to the jury. Any oversight in failing to make a formal ruling thereon cannot be considered as a res-

ervation of ruling in light of the trial court's proceeding with the trial as the record reflects. This Court is not unmindful that the observation made by the defendants as to the assigned Judge's being unable to have the "feel of the case" is a matter that deserves careful consideration, and undoubtedly there is substance to defendants' position in this regard. On the other hand, this Court cannot escape the fact that this case has taken a long time to try, the defendants were represented by experienced and skillful counsel, and the Judge who presided at the trial was recognized by all parties to have been not only an able and experienced trial judge, but one who presided with impeccable fairness and impartiality. Consequently, it would seem that, under these circumstances and after consideration of the entire record, I should not evade the responsibility which rests upon me by summarily granting a new trial, but rather to the best of my ability attempt to render definitive rulings on the various aspects of the motions presented. No doubt an appeal will be taken and the Appellate Court will have the same opportunity as this Court to determine whether or not Judge Hulen should have granted a judgment of acquittal, or whether or not, in the alternative, on the entire record, a new trial should be granted. It would seem to me, therefore, that a Judge assigned to sit under these circumstances should proceed with caution and extreme care before he assumes to find error in that which was done by the trial judge.

In view of Judge Hulen's apparent disposition of the motions for judgment of acquittal, I am not disposed to discuss that question. It seems reasonably clear that he assumed that there was sufficient evidence and facts established, and deductions and inferences from such facts by way of circumstantial evidence, which if believed would justify the jury in finding defendants guilty beyond a reasonable doubt, and in this view I concur.

The troublesome and substantial questions, however, which arise on these motions are to be found in the motions for a new trial. This case, as most criminal conspiracy cases, presents difficult problems of determining what declarations and acts of certain alleged conspirators are competent as against other defendants, as well as the other questions peculiar to this case, such as the effect of granting a mistrial to the defendant Schwimmer, the competency of Government's Exhibit 100-j, the alleged error in selecting jurors from a portion of the division to the exclusion of the remainder, as well as the other matters referred to by the defendants in their various motions. Counsel have presented seven primary questions with respect to their motions for a new trial without waiving any other grounds which may have been urged. These seven primary questions will be considered by the Court in the same order as counsel have arranged them in their briefs, except that the questions as to the sufficiency of the evidence and the competency of Government's Exhibit 100-j will be considered under one sub-head.

I.

Manner of Drawing Jury Panel.

Section 1865 (a), Title 28, U. S. C. A., provides:

> "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense * * *."

By virtue of an order issued by Judge Hulen on April 3, 1956, he excluded from the list of prospective jurors the residents of the City of St. Louis and the County of St. Louis. As soon as this was discovered, counsel for the defendants called to the attention of the court that the population of the entire district, exclusive of St. Louis and St. Louis County, was 294,950 people, whereas the

City of St. Louis and St. Louis County had a population of 1,263,145. The defendants took the position, therefore, that the jury panel did not consist of a representative jury, and contended that they were prejudiced by virtue of this situation. Their motion in this regard was overruled.

There had been a great deal of publicity regarding the pendency of the trial of these defendants in the Press and other news disseminating agencies. It is entirely reasonable to presume that Judge Hulen in entering his order of April 3, 1956, was motivated to do so because it was his view that to obtain a jury from the City and County of St. Louis would be exceedingly difficult, and that it would involve unnecessary expense. The immediate public in the City of St. Louis would be more interested in the happenings in their local courts than the people outside the City. This would be due to the fact that Shu-Stiles and Irving Sachs were residents of the City of St. Louis. Many of the witnesses, including two of the local United States Judges, were residents of the City of St. Louis. In any event, Judge Hulen must have had good reasons for the order he issued. That is a reasonable presumption, and that presumption has in no way been overcome on this showing. True, people living outside the confines of the City of St. Louis have access to the radio, television and daily press substantially to the same extent as the so-called urban people. But nevertheless it seems clear that it would be far more difficult to obtain a jury from residents of the City and County of St. Louis than it would be from the suburban areas in the district. And defendants cannot urge that this was a suburban jury as such and that they were deprived of so-called urban jurors, because it appears that many of these jurors had spent substantial parts of their lives as residents of the City of St. Louis. But however one may attempt to rationalize the impact of publicity on urban jurors, as

distinguished from so-called suburban jurors, the undeniable fact remains that the trial judge here in his discretion, in the interest of justice and economy, determined that the prospective jurors should be called from outside of the City and County of St. Louis. His order in that regard is entirely consistent with the statute. No prejudice is shown by reason of the exercise of such discretion and this Court should not presume to find that there was no reasonable basis for the exercise of such discretion, because on this showing there would be no basis for such finding. The burden rests upon the defendants to establish prejudice, and in this case that burden has not been sustained.

II.

The Alleged Failure of Jurors Brown and Hoffman to Disclose Their Political Affiliations on Voir Dire Examination.

Judge Hulen on voir dire examination propounded the following questions to prospective jurors:

> "Have any of you or the immediate members of your family, mother, father, brother, sister or husband or wife, or children, other than the gentleman who was sheriff, have you or any immediate members taken part in behalf of either political parties in political affairs such as a candiate for office or committee worker?" (R. 37).

After a few responses from certain jurors, the court stated, "Anyone else raise their hand?" Then later the following question was asked by the court of the jurors:

> "Do either of you or are any members of your family affiliated or hold membership or office—we have covered county committees, but sometimes there are Democratic or Republican organizations separate from the committee, and sometimes Democratic clubs or Republican clubs. To your knowledge, are you or

any member of your family any members of such club or organizations? If so, raise your hand."

Neither juror Goldie Brown nor Grace Hoffman raised her hand in response to either question.

The evidence at the hearing on the motions for a new trial, which supplanted the affidavits previously obtained indicate that these two jurors, to wit, Goldie Brown and Grace Hoffman, were members of the Montgomery Township Republican Club in the years 1953, 1954 and 1955, but evidently from the testimony it would appear that they were not in 1956. Robert Hoffman, however, the son of Grace Hoffman, was treasurer of the committee or club in 1956. There is no showing here that Mrs. Hoffman knew that her son was treasurer of the local Republican Central Committee in 1956, and moreover, there is no showing that either of these jurors wilfully failed to answer truthfully the questions to which reference has been made. Furthermore, there is no showing that the defendants were prejudiced in any way by reason of any Republican affiliation or activities of either of these two jurors. This Court has no right to assume that in this trial jurors of Republican political affiliation would be prejudicial to these defendants and that jurors of Democratic affiliation would be prejudicial to the Government. And finally, the record is bereft of any showing that there was fraudulent conduct on the part of these jurors.

III.

The Admission of Certain Testimony as Against the Defendant Schwimmer Only and Whether Its Alleged Harmful Effects Were Eradicated from the Jurors' Minds by Instructions by the Court Withdrawing Such Evidence.

A discussion of this ground for a new trial requires consideration of the motion for mistrial which was

granted as to defendant Schwimmer because of his illness during the trial, and the case proceeded with the remaining defendants, Connelly and Caudle. It appears that the trial commenced on May 7, 1956. On May 23, 1956, the defendant Schwimmer became ill, requiring continuances until May 28th. On that date, after hearing certain medical testimony as to the nature of Schwimmer's illness and his inability to continue in the trial, counsel for Schwimmer made a motion for mistrial, which was granted by the court. Thereupon, attorneys for defendants Connelly and Caudle made a motion for mistrial on the ground that they were being deprived of a material witness in Schwimmer, who was too ill to testify, either in court or by deposition. A motion for mistrial was also directed by reason of certain testimony admitted as to Schwimmer alone and not as to Connelly and Caudle, and there was, according to the defendants, no way that the effect of such testimony could be eradicated from the jurors' minds. The court denied both motions. The Government was, of course, in no way responsible for the unfortunate turn of events with respect to Schwimmer's health. Whether he would testify if called as a witness for the defendants, or claim his constitutional privilege, was a matter of sheer speculation. Moreover, there was no showing or even contention that a declaration of a mistrial as to Connelly and Caudle and the resumption of the trial at some later date would enable these defendants to procure Schwimmer's testimony. So far as this record discloses, Schwimmer never may be able to testify for the defendants even though he were so disposed. Under these circumstances, it would seem to be reasonably free from doubt that Judge Hulen's ruling requiring the remaining defendants to stand trial was correct. If Schwimmer had not been made a party to the conspiracy indictment, the defendants Connelly and Caudle could not complain, and if perchance he had passed away so that it would have been impossible for the Government to indict him, the

defendants likewise could not contend that the Government had lost its right to proceed against them. The situation which now exists is not materially different. As indicated above, whether Schwimmer will ever be able to testify in court or by way of deposition is unknown, at least so far as the showing herein is concerned.

But defendants urge that a mistrial should be granted because of certain testimony which was admissible as to Schwimmer alone and admitted as to him alone by the court, and which they contend was highly prejudicial to them and that the court's direction to the jury to disregard such testimony did not and could not serve to remove from the minds of the jurors the prejudicial effect thereof. The testimony in question which was received as to Schwimmer alone refers to certain conversation between him and one W. J. Dean, and also a telephone conversation between Schwimmer and attorney Sheffrey in March, 1956. A resume of that testimony can best be obtained from Judge Hulen's remarks to the jury when the jury was instructed to disregard it and to remove it from their minds:

> "Members of the jury, there is certain testimony which was given by two witnesses called by the government which I now will withdraw from your consideration. I will not describe that testimony by question and answer form, because that is not the way you recall it. I will describe it in substance because that is the way you are doubtless carrying it in your minds. I first want to refer to a conversation between defendant Schwimmer and W. J. Dean that took place on or about October 3, 1955. You will recall that Mr. Dean testified that he met defendant Schwimmer at the airport in Kansas City. Mr. Dean had preceded Mr. Schwimmer from Puerto Rico by only a short time. Mr. Dean was one of the officials

of the Dean Rubber Company. Schwimmer had certain of his records physically stored at the Dean Rubber Company plant. These records were then subject to a subpoena duces tecum to be produced before a grand jury in St. Louis. In this conversation at the airport, according to the testimony of Mr. Dean, Schwimmer asked Mr. Dean if he could go to the Dean Rubber Company and get some records that he thought the government wanted. Mr. Dean objected to Schwimmer doing this; whereupon, by understanding between Schwimmer and Mr. Dean, one Joe Hoskins, who was a tax attorney for Mr. Dean, was called on the telephone and Schwimmer talked to him, and when he had finished, Schwimmer told Mr. Dean that Mr. Hoskins had told him it was all right for him to go to the plant of the Dean Rubber Company and go through his records and pick out certain records that the government wanted and deliver them to the government attorney who then desired to have them. Now, I withdraw that testimony relating to that conversation from your consideration. That was testimony that Mr. Dean desired to talk to Mr. Hoskins over the telephone after Schwimmer had completed the conversation and that through some misunderstanding or other cause, Schwimmer hung up the telephone before Mr. Dean had a chance to talk to Mr. Hoskins. Mr. Dean testified he and Schwimmer went to the Dean Rubber Company and there Schwimmer went through certain of his records—how many the evidence does not show—which were stored in the Dean Rubber Company plant. That testimony I now withdraw from your consideration. Mr. Dean further testified that later on, or some time in January, 1955, Schwimmer and he had a further conversation and at that time Mr. Dean indicated to Schwimmer that Mr. Hoskins had not given him permission to go to the plant and go through the records that Schwimmer

had stored there. All of that conversation I withdraw from your consideration in this case.

"There was testimony of two telephone conversations between Schwimmer and Mr. Sheffrey. You will recall that Mr. Sheffrey was the attorney in Kansas City who had been employed by Mr. Shifrin, the attorney in St. Louis, to represent Sachs before the Internal Revenue Department in the tax question. I am referring to the testimony given by Mr. Sheffrey as to a telephone conversation that took place between Mr. Sheffrey and the defendant Schwimmer. You will recall that Mr. Sheffrey said that the defendant Schwimmer called him twice, once from St. Louis and once from New York City. In the conversation over the telephone from St. Louis, defendant Schwimmer wanted to know in detail what Mr. Sheffrey had testified to before the grand jury and Mr. Sheffrey testified that he undertook to tell Mr. Schwimmer what his testimony had been. That testimony of the conversation between Mr. Sheffrey and the defendant Schwimmer I now withdraw from your consideration in this case.

"Then a day or two later following the first conversation, according to the testimony of Mr. Sheffrey, in a conversation over the telephone from New York City, Schwimmer told Mr. Sheffrey, Mr. Schwimmer talking from New York City and Mr. Sheffrey being in Kansas City, that he was worried about the case, that is, the Sachs case, and the testimony that Mr. Sheffrey had given before the grand jury and that he was worried about himself and particularly what the Bar Association would do when they learned that Mr. Sheffrey was connected with the case during the time when certain action was taken in connection with it by Schwimmer.

"Now, as to the testimony given by these two witnesses as I have referred to them as to these con-

versations with Schwimmer, I withdraw that testimony from your consideration. I have not gone into it in detail, but you will recall it. You are not to consider such testimony as evidence in this case of any character. Just forget that that testimony relating to the subject and at the times I have referred to was given in this case. Strike it from your minds entirely. It now has no bearing on the issues in this case and you will not consider it in any manner in arriving at your decision as to the guilt or innocence of either of the defendants in this case.

"Does that cover the subject? Ready to start the argument?

"Mr. Newcomb: Yes.

"The Court: Very well. Proceed" (R. 2913-17).

It will be observed that no objection was made as to the language used by the court in striking this testimony from the record and in instructing the jury accordingly. My view is that there is an absence of any inflammatory or prejudicial inferences or deductions in the testimony stricken as to either Connelly or Caudle which was not fully removed by the court's admonition to the jury. Jurors are presumed to obey the instructions of the court. That presumption is the very basis of our entire jury system. True, there are instances where testimony is of such a highly inflammatory and harrowing character that it is reasoned that the harm that has been done by its reception cannot be eradicated by any instructions by the court. But such a situation does not exist here. This testimony was not erroneously admitted. It was properly admitted as to Schwimmer, who was then a party to this lawsuit. When the mistrial was granted as to Schwimmer, there arose this problem as to the striking of this testimony. The court concluded that an appropriate instruction to the jury as given would adequately remove any impact of that testimony to the prejudice of either of

these defendants. Judge Hulen, to use defendants' expression, had the "feel of the case," and he must have concluded that defendants' rights were amply protected and safeguarded by the instructions which he gave. It does not seem that under such circumstances, therefore, this Court should rule to the contrary.

IV.

The Evidence in Rebuttal as to Gifts of Clothing to the Defendant Connelly from Schwimmer.

Connelly steadfastly maintained on direct examination that he never knew that the $750 oil royalty was a gift to him from Schwimmer and categorically denied that he ever intended that Schwimmer should ever make any gift to him of anything that had a substantial value, though he did admit on cross-examination that he had received two suits from Schwimmer of a value of about $300. On rebuttal the Government established that not only had Connelly received two suits from Schwimmer of the value indicated, but also a top coat valued at $110. Objection is made that such testimony should not have been received in rebuttal. Evidence indicating a close relationship between these parties and the nature of their relationship was competent evidence in a conspiracy case. In view of Connelly's testimony on direct and cross, it would seem that there is an absence of any substance to defendant's position that the Government was not permitted to offer in rebuttal the fact that Connelly had received gifts of substantial value from Schwimmer which tended not only to impeach Connelly's testimony, but tended to establish the true relationship between these parties and bore upon Connelly's intent in receiving the $750 gift in connection with the oil royalty.

V.

The Alleged Impropriety of Questions Propounded by Government Counsel to Defendant Caudle Regarding a $5,000 Check.

Both defendants urge error by reason of alleged misconduct of government counsel. The error pertains to certain questions asked of defendant Caudle in connection with a $5,000 check. It appears that when Caudle was testifying on direct as to his conversation with Schwimmer about the latter's buying an oil interest for him, he emphasized that he told Schwimmer that he would not permit anyone to purchase any investments for him and that he would not engage in any business activity with any person until he was assured that the owner of the investment or that the contemplated business transaction in no way involved persons who were under investigation in the Department of Justice. In other words, he made it clear that he would make a careful examination in any business transaction he entered into so as to be assured that no taxpayer under investigation was involved. On cross-examination, the following appears in the record:

> "Q. Mr. Caudle, you said yesterday that you would under no circumstances enter into any transaction involving a taxpayer, a representative of a taxpayer, without the most careful investigation. Do you remember that?
>
> A. Yes, sir, I made that statement until I was perfectly satisfied the person whom I was buying anything from was not under any investigation. I gave my reasons yesterday.
>
> Q. Did you know a man named Harry Knohl?
>
> A. Yes, sir.
>
> Q. Did you know him to be a representative of two taxpayers, named Fretus and Orrin?
>
> A. I knew Harry Knohl was a friend of Mr. Fretus and Mr. Orrin.

Q. Mr. Knohl had conferred with you and others in connection with the Fretus and Orrin case?

A. One time he came over with his two friends whom I indicted.

Q. And you knew there was a pending tax case known as——

A. Yes, they were indicted in 1949 under my jurisdiction, as I remember it.

Q. Mr. Caudle, I show you an original check for $5,000, and I ask you——

Mr. Margiotti: I am objecting to that question and ask the court to rule on it first.

The Court: He has opened it up by his direct examination and also by his cross-examination.

Mr. Margiotti: If the court rules, that is all I am asking for.

The Court: Overruled.

Q. (By Mr. Newcomb) I show you a check for $5,000 and ask you if it is a check made out to you?

A. Yes, sir.

Q. Does it bear your endorsement?

A. Yes, sir.

Q. I will ask that it be marked for identification only at this time—Government's Exhibit 182.

(Which said document was so marked for identification as Government's Exhibit 182.)

Q. (By Mr. Newcomb) Mr. Caudle, I will call your attention to the fact the date of the check is September 18, 1950, and I will ask you whether the maker of the check, a Mr. Stonrell, was a friend and acquaintance of yours?

A. Yes, sir, he was a warm friend.

Q. You have answered the question.

Mr. Margiotti: May the record show this line of cross-examination is over our objection on the grounds it is a collateral matter and not charged in the indict-

ment and raises an issue which is not involved in this case?

(Whereupon, a discussion was had off the record and out of the hearing of the jury.)

The Court: Objection sustained.

Mr. Margiotti: May we ask the court at this time to instruct the jury to disregard the testimony just given?

The Court: I don't think there is an answer to the question. As a matter of fact, I don't think he finished the question" (R. 2744-46).

Apparently the court assumed that the proposed inquiry was leading into a wholly collateral matter. Government counsel contended that proof would develop that, contrary to his protestations in his direct testimony, Caudle did do business with representatives of taxpayers. In any event, the court after hearing apaprently that which constituted an informal unrecorded offer of proof, sustained the objection to the Government's proceeding any further with that line of inquiry.

On redirect examination by Caudle's counsel, reference was made to a certain oil interest in which Caudle was interested, which was referred to as the Fletcher interest, and Caudle was asked by his counsel whether his connection with that interest was compatible with his position as a United States official. Thereupon, government counsel stated to defendant's counsel before the jury that if he proceeded with that question, he would go into the $5,000 check transaction. In that court on the Government's cross-examination had concluded that the $5,000 check transaction was a collateral matter, there probably was no excuse for government counsel's making any reference to it during the redirect examination. However, no motion to strike counsel's remark was made at that time, but later a motion for a mistrial was made on the ground of prejudi-

cial conduct engaged in by government counsel. A colloquy occurred between court and counsel at which time government counsel contended that he had acted in good faith in referring to the $5,000 check in view of Caudle's testimony on direct, but he did recognize that, in his interruption of the redirect examination in the manner indicated and in again referring to the $5,000 check, he had acted hastily and he offered his apology. Judge Hulen, in overruling the motion for a mistrial, made this observation:

"It oughtn't have been injected in the case in any manner and it is regrettable that it was, but I don't believe that it is prejudicial to the jury and I don't think the jury has gotten any idea of what counsel were talking about and the conversation and remarks that passed between counsel about it. As a matter of fact, I just have a hazy recollection about it, myself, and I don't believe the jury got any idea about that check involving any collateral wrongdoing that counsel for the government was about to inquire into.

Mr. Margiotti: It was the attitude used by him when he got up and said, 'If you are going to go into that, I want to go into the $5,000.00 check,' and I hadn't asked Mr. Caudle any question to open the door, because I know how to try a case and I wouldn't ask a question of that type.

Mr. Newcomb: Your Honor, the question was whether the Fletcher oil transaction—whether the Fletcher oil transaction was compatible with his position. Your Honor had excluded any of this other thing and then Mr. Margiotti was going to, I felt, improperly go into it and for the remark I apologize quite sincerely.

The Court: Well, I am going to overrule the motion. I am sorry the matter is in the case, but it is hard to try a case this long without something happening that is not in exact accord with the proper direction of the

case. I think we have had very few of those in this case so far, so the motion will be overruled" (R. 2875-76).

It would seem that Judge Hulen's appraisal of the entire situation is the basis upon which this Court should proceed in determining whether any prejudice resulted to either defendant in the minds of the jury from these events which took place during the trial, and whether by reason thereof Judge Hulen erred in not granting a mistrial. He overruled the motion, and I see no reason why I should assume that under all the circumstances the presiding judge was in error in that regard.

VI.

(a) Sufficiency of the Evidence to Sustain Conviction.

(b) Competency of Government's Exhibit 100-j.

(a) In considering the question as to whether there has been a miscarriage of justice and whether there is sufficient evidence to sustain the verdicts of conviction, I have examined and re-examined the record herein with considerable care and a great deal of reflection. Obviously, there are some facts as to which there is no real dispute in the record: (1) Irving Sachs was guilty of a wilful and flagrant tax fraud to which there was no defense; the contentions regarding voluntary disclosure or promise of immunity from prosecution were without any real substance; and (2) Schwimmer was retained as attorney for Sachs because of his acquaintances and presumed prestige in Washington circles. He was not a tax lawyer. He entered the case when it was on the Kansas City level and before it had been sent to Washington, to allay any suspicion that he had been brought in to the case because of his entre to Washington political circles. (3) No mention was made of Sachs' health as a matter of any concern in the

discussions of this tax case by Sheffrey or Shifrin or Schwimmer with local tax agents in Kansas City or Chicago. (4) When Schwimmer had his first conference with Oliphant in the Bureau of Internal Revenue in August, 1948, he made no mention of Sachs' health as a material factor in determining whether or not criminal prosecution should be instituted. (5) The first time the condition of Sachs' health was mentioned was when Schwimmer discussed the case with defendant Caudle in October, 1949, and at that time the Bureau of Internal Revenue had forwarded the case to the Department of Justice after about a year's delay, with a recommendation for prosecution.

There is no question that Irving Sachs was suffering from epilepsy, but in that connection it is significant that his own lawyer, Mr. Shifrin, who had represented him for some twenty years, did not know that he was suffering from that ailment. Moreover, it is an admitted fact that during the period when the Department of Justice was considering the gravity of his malady, he was able to look after his business in substantially his usual and normal manner. He was chief executive of a substantial concern. The only personal physical examination to which he had been subjected for the Government was made by Dr. Bell of St. Louis, a consultant for the United States Public Health Service in neuropsychiatry in the United States Marine Hospital at Kirkwood, Missouri. He made a report to Caudle as the result of his examination and stated that in his opinion any fatal outcome in the case of prosecution and trial of Sachs was "remote indeed." Thereafter, Sachs refused to be examined by any government doctor, presumably upon the alleged grounds that he was unable to undergo the ordeal of such examination. In any event, he was examined repeatedly by doctors obtained by his counsel, and it seems evident that the jury, in light of all the evidence, had a right to find that Caudle was determined that Sachs should not be prosecuted, regardless of

Dr. Bell's views and regardless of the first recommendation of the subordinates in his own office, and regardless of the repeated request for permission to present Sachs' case to the grand jury by Drake Watson, the United States Attorney at St. Louis. There is abundant evidence to indicate that Caudle was determined to build up a medical history, diagnosis, and opinions as to Sachs' health weighted in behalf of the defendant, which would assume to furnish substantial proof that this prospective defendant was one who was entitled to the protection of the so-called health policy of the Department. He paid but scant attention to the generally recognized principle that a decision not to prosecute by reason of the health of the taxpayer required a certificate by a competent doctor who had examined the taxpayer at the Government's request, certifying that trial and prosecution would constitute a clear and present danger to the prospective defendant's health.

The very formidable array of medical men who examined Sachs and who predicted such dire results if Sachs were prosecuted are not necessarily to be considered as conspirators or men who corruptly made a false diagnosis. They were medical men hired by Sachs' lawyers for the purpose of enabling him to escape a criminal prosecution. The Government, for reasons known only to Caudle, was deprived of any voice in determining Sachs' true condition except as reflected in Dr. Bell's report. As indicative of Caudle's unusual interest in protecting the interests of a taxpayer who was guilty of a flagrant fraud, reference may be made to a conversation tha he had with Mr. Oliphant of the Bureau of Internal Revenue in January, 1950, when he inquired of Oliphant about the plan that should be followed in arranging for medical examination. Apparently he was under the impression that the Penal Division of the Bureau of Internal Revenue would select a public health doctor, but he stated to Oliphant that "the lawyer was afraid they might pick one prejudiced by the

agent." In any event, it seems clear that after having received Dr. Bell's report, Caudle worked hand in hand with Schwimmer in arranging for the production of a medical record relating to Sachs which would furnish him grounds to deny prosecution.

The defense emphasizes the report of the panel of doctors from St. Elizabeth Hospital, Washington, D. C., as persuasive proof that Caudle was attempting to obtain the unbiased report of an unprejudiced group of doctors. However, it must be remembered that all of the medical data outside of Dr. Bell's report were arranged, compiled, and obtained at the behest of Sachs' lawyers. Although Dr. Bell's report was included, the doctors at St. Elizabeth Hospital had before them the vastly more complete and detailed medical history assembled by Sachs' lawyers, the opinions of doctors hired by Sachs' lawyers, who expressed their conclusions as to Sachs' health and the effect that a trial and prosecution would have thereon. The opinion of the St. Elizabeth Hospital panel was predicated solely upon the basis of the written data which was submitted to them by Caudle. They never had examined or seen Sachs. And it is not without significance that Dr. Cruvant of the St. Elizabeth panel was a friend of one of the doctors engaged by Sachs and had discussed the case with that doctor before the report of the St. Elizabeth Hospital panel was issued.

Drake Watson, United States Attorney at St. Louis, wrote Caudle regarding the delay in the prosecution of the Sachs case on September 1, 1949, December 7, 1949, December 20, 1949, and January 20, 1950. Mr. Cunningham, one of Caudle's top assistants in the Department of Justice, notwithstanding the medical data assembled by Schwimmer, recommended prosecution at least three times during the year 1950. And although deputies Rothwacks and Smith in the Department of Justice finally agreed with Caudle that the medical data justified a non-prosecu-

tion ruling as to the Sachs case, the fact that they were Caudle's subordinates and finally acquiesced in his conclusions is of no great significance. Each of these subordinates had previously recommended prosecution. And indeed, it is singular that Caudle should attempt to fortify his own position by attempting to obtain Oliphant's views regarding prosecution in the Sachs case. However, in this he was not successful in that, after a delay of some three months, Oliphant stated on September 7, 1950, that in his opinion the views of the government-appointed physician, Dr. Bell, were controlling.

Reference is made to personal experiences that Caudle had as a young man with schoolmates who were afflicted with epilepsy and the harrowing experiences that he had in observing the manifestations of convulsions and seizures which he contends caused him to be overly sympathetic with anyone who had to be subjected to epilepsy which was approaching the grand mal type. He also contends that, as evidence of his good faith in assuming that Sachs could not stand trial without endangering his life, the opinion was expressed by Judge Harper, who sentenced Sachs, that if it were not for Sachs' epileptic condition, he would have sent him to prison instead of imposing a fine, and Caudle urges that Judge Harper had substantially the same medical data before him as was available to the Department of Justice. He urges, therefore, that he cannot be charged with bad faith in placing credence in this medical data when Judge Harper found it reliable. However, whatever Judge Harper may have concluded regarding Sachs' health, it is quite evident that he did not conclude that Sachs should escape prosecution or be freed from any criminal conviction because he was epileptic. To the extent that Judge Harper may have known in what way the medical data was obtained does not appear in the record. In any event, Sachs was indicted, pleaded guilty, and was sentenced, regardless of all the dark forebodings as to

what would happen if he were indicted and prosecuted. Here we have a man who was going about his business in the usual and normal manner during all of this period, and two days before he was sentenced by Judge Harper he was in the City of Chicago attending a convention of shoe manufacturers. It is difficult to understand the attitude of the Tax Division of the Department of Justice when it referred to the prosecution and trial of Sachs as being the factor which might have a fatal result. Of course, the fact is that Sachs had no defense. There was nothing to try, which was quite evident when he finally was indicted and entered his plea of guilty. The unyielding determination of Caudle to save Sachs from prosecution in light of all the circumstances disclosed by the evidence fully justified the jury in finding that he was proceeding in this tax case bent upon saving this taxpayer from any criminal prosecution. Whether he acted corruptly was a jury question. That issue was made clear to the jury when the court stated:

> "The defendant Caudle during the period involved in the indictment referred to in this case was Assistant Attorney General of the United States in charge of the Tax Department in the Attorney General's office. As such it was his duty to determine whether or not the taxpayer Sachs should be criminally prosecuted and if prosecuted whether the then existing health policy of the Department of Justice should be applied in view of the claimed physical and mental condition of said Sachs. If you find that in rendering decisions and in actions taken on matters applicable to the Sachs tax case, Caudle exercised that duty honestly and not as a part of the conspiracy charged, then you are instructed that it is your duty to render a verdict of not guilty as to defendant Caudle, even if it later developed that he may have been mistaken in the exercise of his judgment.

"While one may become a party to or member of a conspiracy without full knowledge of all details thereof or means to be used by conspirators, a person having no knowledge of conspiracy, but acting in a way which furthers an object thereof, does not become a conspirator, as some willful participation by him in the conspiracy with intent to further common purpose or design must be shown to establish his guilt of conspiracy. Therefore, if the jury should find that there was a conspiracy existing among others than defendant Caudle before the Sachs tax case was referred to the Department of Justice and that Caudle had no knowledge of such conspiracy, his subsequent acts, even though in furtherance thereof, did not make him a conspirator unless his acts involved participation in such conspiracy with knowledge thereof and with willful intent to further the purpose of such conspiracy" (R. 3151-52).

And of course the fact that Sachs was ultimately indicted and sentenced is no defense here. The conspiracy in order to be illegal did not have to be successful.

It was some time before August 4, 1950, that Caudle stated he had a telephone call from Schwimmer in which the latter informed him that he had bought two small oil interests, one for himself for $750 and one for Caudle in the same amount. Caudle then states in his testimony that when he heard that from Schwimmer over the telephone,

"* * * I absolutely was shocked and cut him to ribbons for having bought something without me knowing about it. He paid for it without me knowing about it and took the deed in my name without me knowing about it, somewhere in Oklahoma, and I gave Harry Schwimmer one of the hardest, roughest dressings-down he ever got from any man, I reckon, but he got a tongue-lashing from me. I used such strong lan-

guage I know I apologized to Mrs. Caudle when I finally put the receiver down.

Q. Can you tell me about when that was—I am going to show you Plaintiff's Exhibit 106, being a letter from Harry Schwimmer to you. I want you to look at it. It is addressed to you at your home; it is a special delivery letter, stamped Kansas City, August 4th—Washington, D. C., August 5, 1950.

A. Yes, sir.

Q. Will you look at it?

A. Yes, sir.

Q. At the time he talked to you had you received that letter?

A. No, sir; I don't think I had.

Q. How soon after your conversation did you receive that letter?

A. It was a day or so later, as I remember. He called me back. Harry Schwimmer, after this first conversation, and he told me that he wouldn't injure me and that he was going to correct it, and I demanded that night, I said, 'I want you to prepare a deed for Mrs. Caudle and I to sign to take this out of our names, whatever this thing is in Oklahoma, this title you put there,' and he told me he would before the conversation was over on the telephone. And I don't know whether it was in that same conversation —I do not think that it was, because it has been so long ago, and I think that Schwimmer, after this first call to me, of saying he had bought this and put it in my name, and asking me to send him a check for it, when he got—he called me and said would I sign a temporary transfer order to stop the little checks going to the people who used to have it, that would give him time enough to prepare a deed for us to sign, that he would prepare, so that we could get this title out of our name, and I told him I didn't want to do it. He said, 'I can't do it; the title is in your name,'

but I said, 'You put it in my name.' Finally I told him I would sign the transfer order, but I would not sign a check until he had prepared a deed for me and my wife to sign to get this thing out of our name, in Oklahoma, that he had put there" (R. 2671-73).

It will be observed that after the telephone call from Schwimmer to which Caudle referred, and at which time he contends he gave Schwimmer such a tongue-lashing because the oil transaction had been entered into without notice, knowledge, or consent, it appears that a letter, Government's Exhibit 106, was written by Schwimmer to Caudle. This letter reads:

"August 4, 1950

"T. L. Caudle
2939 Newark N. W.
Washington, D. C.

Dear Lamarr:

Enclosed please find transfer order on your share of the royalty we have purchased. On the back of the order there is a place for you to sign above the space designated 'Buyer sign here.' Have someone witness your signature or I will witness it and return this order promptly to me so I can complete the transaction.

I shall forward the deeds to the Clerk of the County Court of Logan County at Guthrie and as soon as the original deed is returned I will send a copy to Sinclair Prairie and forward the original deed to you, of course. This royalty should pay close to $50.00 a month for a good number of years and it is an excellent investment.

Kindest personal regards.

Sincerely,

Harry I. Schwimmer."

And on September 6, 1950, Caudle wrote to Schwimmer, the copy, Government's Exhibit 144, reading as follows:

"September 6, 1950

"Dear Harry:

I enjoyed seeing you very much the other day and am sorry that I couldn't be with you longer.

Bob Fletcher never got to New York. He called me yesterday from Reading, Pennsylvania, and said how sorry he was that he didn't get to see you. He said your letter had been received at his office. He told me that he would contact you on his return to Dallas, and would be back there this weekend.

He is a mighty fine fellow to know and I want you to meet him. I told him all about you and he is anxious to meet you. If I hear of any good investments along that line I will let you know. I would suggest that you tie on to the Harvey Tract when you get the information that answers the questions that you would like to ask him.

Come back to see us again when you can.

Good luck and best wishes always to you.

Sincerely your friend,

Mr. Harry Schwimmer
Attorney at Law
1260 Dierks Building
Kansas City, Mo."

And on September 8, 1950, Schwimmer wrote to Caudle, Government's Exhibit 107, as follows:

"September 8, 1950

"Mr. T. L. Caudle
2939 Newark N. W.
Washington, D. C.

Dear Lamar:

Your good letter of the 6th received. Glad to hear from you. I tried to contact Fletcher in New York but couldn't and I now know why. I hope I have a chance to meet him on his return trip to Dallas.

You remember I talked to you about the Knapp-Monarch Co. of St. Louis, Missouri, whom I have represented for a long time. In the last war they did a large amount of work for the Government manufacturing hand-grenades and parts for the Girand rifle. I would like very much to be able to get some Government contracts for them.

Their main business in [sic] the manufacturing and developing of electrical devices and electrical appliances.

I am sending you under separate cover a financial statement for last year which also has a picture of their St. Louis plant.

I will have the letter from the doctor for you next week. It was swell seeing you while in Washington. Hope I will see you again soon.

Fondest Regards,

Harry

Harry I. Schwimmer."

Obviously, the writing of these letters and the very friendly relationship which they evidence are wholly inconsistent with any breach of relationship between the parties which Caudle contends took place when he received

the telephone call some time prior to August 4, 1950, and the undisputed fact remains that, in accordance with Schwimmer's request in his letter of August 4th, Caudle did sign the transfer order, although he contends that he signed this document solely to avoid the royalty checks going to parties who had already parted with the title. But the subsequent conduct of the parties strongly suggests that the vehement protestations claimed to have been made by Caudle were at least highly exaggerated. It is true that, although he endorsed the first three royalty checks, they were returned to Schwimmer and there is no evidence that Caudle ever received any of the proceeds of the three checks that he did endorse. However, Schwimmer utilized the proceeds of these three checks for the purpose of purchasing a cashier's check payable to himself, which he did not cash for over a year. Caudle contends that during all of this time he was repeatedly asking Schwimmer to obtain for him a deed that he and Mrs. Caudle could sign so as to divest themselves of this oil property. The deed, however, was not forthcoming for the Caudles to sign. The long delay in regard thereto is inexplicable unless it was in accord with the wishes of the parties concerned.

It was on January 11, 1951, that Caudle formally by letter informed Schwimmer that prosecution would be declined in the Sachs case. On the next day, Schwimmer obtained another check for $10,000 from Irving Sachs. In March, 1951, Caudle had not received the necessary papers from Schwimmer to divest himself from the oil royalty title, and at that time he contends that he was in Miami, Florida, and learned that Schwimmer was there. He contends that he conferred with him and again insisted upon getting the blank form of deed from him so that he and Mrs. Caudle could sign it. Schwimmer's excuse for the delay was his illness. It was on this occasion that Caudle endorsed one of the royalty checks totaling some-

thing over $60. But he contends that the check was dated December 15, 1950, and would be void if not cashed in three months, and that as a favor to Schwimmer he cashed the check, advancing him the amount thereof and then deposited the check in his own bank account in Washington. It was not until April 16, 1951, after the indictment of Sachs and after the Senate Committee had heard some evidence as to the alleged mishandling of the Sachs case by Caudle, that Schwimmer forwarded the deed to Caudle. On April 19, 1951, Caudle sent the executed deed to Schwimmer with a letter stating that this was being done "to cover the error that was made in this matter."

It was on February 12, 1951, that Drake Watson, United States Attorney, wrote Caudle that he was once more proposing a grand jury investigation of Internal Revenue matters in the Eastern District of Missouri. It was apparent that Judge Moore of that district had requested Watson's assistance. In reply Caudle wired [Government's Exhibit 116 (c)]:

> "Reurlet February Twelve Nineteen Fiftyone Concerning Communication From Citizen to Judge Respecting Several Cases of Possible Income Tax Evasion Stop Matter Under Consideration Here Stop Do Not Present Any Cases to Grand Jury Unless Specifically Authorized by This Office Stop Will Write Soon.
>
> Theron L. Caudle,
> Assistant Attorney General."

When, however, a Deputy Attorney General of the United States gave Watson clearance for such investigation notwithstanding Caudle's telegram, the latter telephoned Schwimmer in Kansas City on February 28, 1951, that Watson was going to present the Sachs case to the grand jury. The indictment against Sachs was returned on or about March 1, 1951. He entered a plea of guilty that Fall. Weiffenbach, the probation officer at St. Louis, was ordered to

make a presentence investigation and wrote to Caudle on September 13, 1951, for information regarding the medical reports in the Sachs case and asked for Caudle's views. It is to be gathered from the record that this letter did not go to Caudle personally as the answer was signed by one Fred G. Folsom, who apparently was acting as "Section Chief." The letter stated that it was not the practice of the Department to make recommendations with respect to sentence, but it did state that, if recommendation was requested by the court, it was the policy of the Department to recommend a substantial fine and a jail sentence. When Caudle learned of this letter, he telephoned to Weiffenbach and stated that the letter had been sent without his knowledge and approval. He ordered Folsom to prepare another letter, and in this letter he was very emphatic that Sachs should not be sent to prison, and further stated that in his opinion Sachs never should have been indicted. A consideration of the entire record as to Caudle's complicity in the conspiracy charged leaves no doubt as to the sufficiency of the evidence to sustain the jury's determination of guilty as alleged in the indictment.

The sufficiency of the evidence as to Connelly is undoubtedly more troublesome and presents questions closer than those which arise in considering the evidence relating to the defendant Caudle. But analysis of the evidence which the jury had a right to consider and the reasonable inferences to be deduced therefrom presents a picture which was sufficient to convince a reasonable person beyond a reasonable doubt of his guilt. Connelly contends that he became enmeshed in a web through the machinations of Schwimmer in a situation where he did not know Sachs, had no intention of corruptly influencing any tax official, that out of deference to Schwimmer's standing with Tom Evans, a friend of President Truman and the Administration, his telephonic appointment conversations with Oliphant or Caudle were made without any intention

or knowledge that he was instrumental in causing any official of the United States corruptly to evade his sworn duty to his Government, if that be the fact. Connelly's position in this regard was carefully outlined to the jury when the court stated in its instructions:

> "Even though you may believe and find from the evidence and beyond a reasonable doubt that Schwimmer and Sachs, and/or other persons entered into a conspiracy to defraud the United States of its right to the conscientious and unbiased judgment and actions of defendant Connelly as Appointment Secretary to the President of the United States, with regard to the processing of the Sachs, Shu-Stiles case, and even though you may believe and find that in pursuance of such conspiracy said parties or any of them attempted to unduly influence defendant Connelly, and to draw him into the accomplishment of their plans and even though you may further find and believe that defendant Connelly did arrange appointments and lend other assistance as shown in the evidence which tended to facilitate their course and to further the aims and purposes of their conspiracy, nevertheless you must acquit defendant Connelly unless you are satisfied by the evidence in this beyond a reasonable doubt that defendant Connelly had knowledge and was conscious of the unlawful and felonious aims and purposes of said conspiracy and with that knowledge and understanding purposely entered upon the furtherance thereof" (R. 3146-47).

It seems obvious, however, that Schwimmer's first introduction into the Sachs case was for the purpose of informing the Bureau of Internal Revenue office that he was a person of sufficient importance to have the President's Appointment Secretary pave the way for a favorable hearing. That is evidence when Schwimmer already had made an appointment with Oliphant. It was not necessary for

Connelly to arrange any appointment. However, on August 10, 1948, he telephoned Oliphant stating, "I understand Harry Schwimmer of St. Louis has a conference this afternoon. He asked me to call you and let you know we know him." Then in September, 1948, when Schwimmer called Oliphant, he, Schwimmer, stated, "Matt thought it would be a good idea to see if there is anything new in regard to Shu-Stiles." Although Government's Exhibit 54-f, which contains this conversation, was received in evidence solely as to Schwimmer, nevertheless the jury had a right to consider it if a prima facie case had been made out by other evidence of Connelly's complicity in the conspiracy. Clearly, it was an act by Schwimmer in furtherance of, and made during, the conspiracy. That Connelly knew and understood that Schwimmer's business with Caudle was an attempt to obtain a commitment from the Department of Justice that there would be no criminal prosecution in the Sachs case, seems evident from the conversation which Connelly had with Oliphant over the telephone on January 16, 1951. At that time Schwimmer already had obtained a letter from Caudle stating that there would be no criminal prosecution in the Sachs case, but notwithstanding he was attempting to obtain a similar letter of no-prosecution from the Bureau of Internal Revenue. In a conversation with Connelly over the telephone, Oliphant stated, "You know Schwimmer on Sachs—does he just want to look good?" And Connelly replied, "Wants to make sure not going to reverse justice again." Certainly, this conversation would indicate that Connelly was aware of Schwimmer's plans to have both Departments committed on the Sachs case so that he need have no fear that the Bureau would render a ruling adverse to that which he obtained from the Justice Department. Moreover, it must be apparent that Connelly knew that Schwimmer had obtained a no-prosecution letter from Caudle at that time. The friendly relations between Con-

nelly and Schwimmer and the six or seven or more telephone calls to government officials made by Connelly with reference to the Sachs case fully warranted the jury in determining that Connelly's relation with the case that was pending in the Bureau of Internal Revenue and then in the Department of Justice was something more than mere routine telephone calls for the arranging of appointments.

It is on the entire background disclosed by the evidence that one must appraise the oil royalty transaction between Connelly and Schwimmer. It occurred at a time when the case apparently had been stalled by Oliphant in the Internal Revenue Department for over a year and now was finally to be considered by the Department of Justice. Connelly was not a naive person, bereft of experience in business affairs and dealings with businessmen. He had been an investigator for one of the Senate Committees, and he was then occupying a position of considerable responsibility with the Administration in Washington. Therefore, when without any consideration paid by him, he received from Schwimmer in December, 1949, an oil royalty which later paid him some $1,400 in dividends and some $1,600 when it was sold, the jury had a right to draw such reasonable inferences and deductions from that incident that a reasonable person would deduce. When he discussed the prospect of getting an oil royalty from Schwimmer and stated to Evans that he did not have $750 with which to make such an investment, he was immediately offered a loan in that amount by Evans, which he accepted. Thereafter, he sent Schwimmer his own check and Schwimmer repaid Evans the $750 which Evans had advanced to Connelly. It is inconceivable that Connelly did not know what had happened in this regard. He must have assumed that an oil royalty which would return about $60 per month must have cost more than $750. Schwimmer, of course, paid $3,600 for the royalty. The record is replete

with incidents reflecting Schwimmer's prestige and standing in the Bureau of Internal Revenue and the Department of Justice during this period. The delays in the Bureau of Internal Revenue apparently were due to Oliphant's inaction. The delays in the formal preparation of the weighted medical report in favor of the taxpayer so as to produce an apparent basis for the application of the health policy of the Department of Justice was accomplished after the case had been forwarded to that department.

Connelly, who had interested himself in the Sachs case in both of these departments, was the recipient of a gift from which he realized nearly $2,000. If he assumed in good faith that he had paid $750 for the oil royalty, he must have known that Schwimmer provided him with an investment that paid the extraordinary return one hundred per cent annually. And it is difficult to reconcile Connelly's claim of making a bona fide business investment in an oil royalty when it appears that when he testified before the grand jury, he was unable to state whether the royalty cost him $1,000 or $4,200. Is it reasonable, therefore, to assume that a man in public service holding a high political office would be the recipient of that type of an investment merely because of a few routine telephone appointments made as a courtesy to a friend? True, there were other matters in which Schwimmer was interested in Washington, such as the so-called helium matter, and as to which Connelly had bestowed some favors upon Schwimmer, but the bulk of Schwimmer's business in Washington during the period in which Connelly was of help to him was the Sachs case. Connelly knew that the oil royalty checks payable to him came first to Schwimmer, and then would be mailed by Schwimmer in the latter's envelope stationery to Connelly's home address in Washington. The evidence, direct and circumstantial, links Connelly to the conspirator, Schwimmer, in a very close friendly basis, so close that Connelly accepted such personal items as

new tailor-made suits and a top coat from the person who had bestowed upon him many courtesies when he had business in Washington.

I cannot say, therefore, that there is an absence of credible evidence to justify reasonable jurors in finding beyond a reasonable doubt that a prima facie conspiracy case was made out against Connelly and Caudle so as to justify consideration by the jury of Government's Exhibit 100-j, and if that exhibit constituted competent evidence against them, then it seems to me that there can be no real doubt as to the sufficiency of the evidence before the jury with reference to their guilt. This brings me, therefore, to a discussion of the competency of Government's Exhibit 100-j as evidence against each of these defendants.

(b) The record reflects that the relevancy and competency of Government's Exhibit 100-j gave Judge Hulen a great deal of concern and that he vacillated in passing upon this question. Finally, however, after considering the briefs that had been filed by counsel, he determined that in a conspiracy case the evidence was competent. The exhibit consists of a bound record book in which there are numerous entries in Schwimmer's handwriting, running from January, 1948, to December, 1950. Many of the entries referred to his account with the Shu-Stiles Company in this tax matter. Obviously, only those entries pertaining to Schwimmer's account with Shu-Stiles could be relevant in this proceeding and the remaining entries were eliminated. Among the entries on a page captioned October, 1949, identified as Government's Exhibit 100-j, appears the following:

"Shu-Stiles	$10,000
Pd out Oil Royalty M. C.....	4,200
Held in escrow to be paid out depending on whether I. Sachs case is dropped."	5,800

It is not disputed that this entry was made by Schwimmer during the existence of the alleged conspiracy, and, obviously, there is an abundance of evidence that would justify the jury in finding that Schwimmer was one of the conspirators as charged in the indictment. The evidence fully warrants a finding that when Schwimmer wrote the initials "M. C.", he was referring to the defendant Matthew Connelly, and that the entry related to the subject matter of this conspiracy. But the question arises as to whether or not the entry is competent evidence as to these defendants. Basically, that question depends on whether a prima facie conspiracy as charged in the indictment has been established without the benefit of this exhibit. If there was sufficient evidence for the jury to make an affirmative finding in that regard beyond a reasonable doubt, it would seem that there can be no real question that this entry was an act made by a conspirator during the existence of the conspiracy and in the furtherance thereof, and hence constituted competent evidence as to all members of the conspiracy. All acts relating to the negotiation, payment for, and disposition of the oil royalty were acts pursuant to and in furtherance of the conspiracy. It is established by competent evidence that Schwimmer received from Shu-Stiles the sum of $10,000 in October, 1949. Shortly after this payment, it appears that Schwimmer began to negotiate with Chris Rhodes for an oil royalty interest for Connelly. The deal for the oil royalty was consummated for $3,600. There appears to be a discrepancy between the amount actually paid for the oil royalty and the amount that Schwimmer set up in his ledger as the anticipated payment therefor, but obviously this discrepancy does not affect the competency of the exhibit received in evidence—rather, it would go to its weight. It was on December 30, 1949, that the oil royalty purchase for Connelly was consummated. There was ample circumstantial evidence to warrant a finding without refer-

ence to Exhibit 100-j that when Schwimmer was paid $10,000 by Sachs in October, 1949, the money was paid for the purpose of enabling Schwimmer to purchase oil royalties for certain officials of the United States Government who were aiding Schwimmer in the Sachs case pending in Washington. When the jury was considering the sufficiency of the evidence regarding the complicity of Connelly and Caudle in this conspiracy, they had before them not only the fact that Connelly had received a substantial investment from Schwimmer, but that Caudle, who was directly handling the Sachs case in the Department of Justice, likewise received the same type of investment from Schwimmer, which cost substantially the same amount. Government's Exhibit 100-j does not represent the entry of a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy.

The defendants emphasize the dilemma in which they allegedly found themselves because of their inability to cross-examine Schwimmer with reference to Exhibit 100-j and to obtain from him his testimony as to his construction of this entry, what it meant, why he recorded it, etc. Manifestly, this Court is in no position to determine to what extent, if any, the defendants may be prejudiced by their inability to obtain Schwimmer's testimony. His testimony might be helpful. On the other hand, it might be detrimental. The undeniable fact is, however, that through no fault of the Government, Schwimmer's testimony is not available to anyone. *Moreover, it does seem*

overwhelmingly clear, and one would be credulous to assume otherwise, that when Sachs paid the $10,000 to Schwimmer, the payment was made for the very purpose which thereafter was recorded by Schwimmer in this controverted document. In other words, the evidence is strikingly persuasive that Schwimmer turned over the oil royalty to Connelly because of Connelly's aid and assistance in the Sachs case, and that he likewise turned over the oil royalty to Caudle because of the latter's assistance in that matter. Whether these two government officials, by reason of the acceptance of these oil royalties, corruptly used their power and influence to decline, or to aid and assist government officials in the declination of criminal prosecution of Sachs and Shu-Stiles, was, of course, the ultimate fact question, dependent primarily upon circumstantial evidence, that the jury had to determine in passing upon the guilt or innocence of these two defendants. This exhibit does not stand alone without corroboration, without other facts and circumstances to sustain its verity, and while the Court has not assumed to discuss the admissibility of the exhibit under the so-called "shop book" rule or the Federal Business Records Act, there seems to be ample basis for sustaining Judge Hulen's ruling thereon on the premises heretofore set forth. In his instructions, Judge Hulen fairly stated to the jury the rule of law with reference to acts and declarations of other conspirators being binding upon the defendants on trial under certain circumstances, as follows:

> "Not only must the unlawful conspiracy come into existence and the defendants or a defendant be a party to it, but, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy. All parties to the conspiracy are responsible and chargeable, during the continuance of the conspiracy and while they are parties to it, with the acts done by any one or more of the parties

to the conspiracy when done to effect the object of the conspiracy. So if, in this case, you determine that either or both of the defendants was a party to the conspiracy charged, then such defendant or defendants as are shown to be parties to the conspiracy, are responsible for all acts committed by any other party or parties shown to be parties to such conspiracy during the time such defendant or defendants are parties to the conspiracy.

"I will state it another way: It is not necessary that each of the parties to the conspiracy shall have committed or joined in committing all acts of other conspirators to effect and carry out the objects of the conspiracy" (R. 3135-36).

That a case which involved so many incidents and events and which required so many days for trial presented a difficult problem for a jury is evident. However, they should have had no difficulty in determining that there was a conspiracy between Schwimmer and Sachs to effect the illegal acts set forth in the indictment. The difficult question is whether the evidence as to the complicity of each of these defendants in the conspiracy charged was susceptible of a finding that it is consistent only with that of guilt. In other words, it is clear that both Connelly and Caudle performed certain acts which tended to further the illegal conspiracy initiated by Schwimmer and Sachs. The crucial question is: Did they do so with an evil and corrupt intent, as charged in the indictment? The jury concluded that they did. And after due consideration the Court is of the opinion that the findings of the jury in this respect should not be disturbed.

It follows, therefore, that the respective motions of defendants Matthew J. Connelly and T. Lamar Caudle, and each of them, for a judgment of acquittal, or in the alternative for a new trial, must be, and the same hereby are,

in all things denied. It is so ordered. Exceptions are reserved.

Sentence will be imposed on March 5, 1957, at nine o'clock A. M., at the United States Court House, St. Louis, Missouri.

Dated this 8th day of February, 1957.

By the Court:

Gunnar H. Nordbye,
Acting Under Assignment to the
Eastern District of Missouri,
Eastern Division.

APPENDIX B.

United States Court of Appeals
for the Eighth Circuit.

No. 15,746

Matthew J. Connelly and T. Lamar Caudle, Appellants,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 15, 1957.]

John H. Lashly and Jacob M. Lashly (Paul B. Rava, Lashly, Lashly & Miller and Alan Y. Cole were with them on the brief) for Appellant Matthew J. Connelly.

John J. Hooker (Walter M. Haynes and C. Arthur Anderson were with him on the brief) for Appellant T. Lamar Caudle.

Warren Olney, III, Assistant Attorney General (Harry Richards, United States Attorney, and Carl H. Imlay, Attorney, Department of Justice, were with him on the brief) for Appellee.

Before GARDNER, Chief Judge, and VOGEL and VAN OOSTERHOUT, Circuit Judges.

GARDNER, Chief Judge.

Appellants with one Harry I. Schwimmer were indicted under an indictment which charged them with conspiring to defraud the United States government in violation of

Section 371, Title 18, U.S.C. The single count indictment alleged that the purpose of the conspiracy was to defraud the United States of the proper administration of the Internal Revenue laws and regulations, of the proper and faithful service of appellants Connelly and Caudle and to commit the offenses of bribery, perjury and knowingly making false statements and entries. The indictment named as co-conspirators but not as defendants Irving Sachs, Ellis N. Slack, Shu-Stiles, Inc., and divers other persons to the grand jury unknown. At all times pertinent to the issues here involved appellant Matthew J. Connelly was Appointment Secretary to President Truman; appellant T. Lamar Caudle was an Assistant Attorney General in charge of the Tax Division of the Department of Justice; Harry I. Schwimmer was a Kansas City, Missouri, lawyer; Ellis N. Slack was an attorney in the Department of Justice; Irving Sachs was a St. Louis, Missouri, shoe broker, and Shu-Stiles, Inc. was a Missouri corporation of which Sachs was president. The indictment further charged that the purpose of the conspiracy was to protect Irving Sachs from criminal prosecution for Internal Revenue law violations.

After considerable testimony had been introduced by the government in support of the indictment Harry I. Schwimmer, named as a defendant, suffered a heart attack making it impossible for him to be present at the trial and thereupon a five day continuance was had. On proof that defendant Schwimmer could not, because of his heart condition, continue to be present at the trial or to participate therein the court declared a mistrial as to him whereupon appellants Connelly and Caudle moved for a mistrial as to themselves, which motions the court denied. At the close of the government's evidence in chief appellants moved for judgments of acquittal which motions were denied. The appellants then offered evidence in their defense and at the close of all the evidence they renewed their motions

for judgments of acquittal. The court announced that it would reserve ruling on these motions. At the close of all the evidence the court withdrew from the consideration of the jury the allegations of the indictment regarding the substantive offenses of bribery, perjury and knowingly making false statements and entries and then submitted the case to the jury on instructions to which no exceptions are here urged. The jury returned verdict of guilty as charged in the indictment and thereafter appellants interposed motions for judgment of acquittal notwithstanding the verdict, or, in the alternative, for a new trial. They also renewed their motions for mistrial which had been denied at the time a mistrial was declared as to defendant Schwimmer. The court set these motions down for hearing thirty days from the date of filing. Twelve days before the date set for hearing Judge Hulen, who had heard the case, departed this life and thereafter and in due course Judge Gunnar H. Nordbye, United States District Judge for the District of Minnesota, was appointed as successor judge under Rule 25, Federal Rules of Criminal Procedure. Subsequent to the appointment of Judge Nordbye as successor judge appellants filed a supplemental motion for new trial on the ground of newly intervening facts, namely, the death of Judge Hulen, whereby appellants alleged they were deprived of the determination of pending motions by the trial judge, and on the ground of newly discovered evidence regarding the failure of some jurors to answer material questions propounded by the trial court upon voir dire examination. A hearing was had before Judge Nordbye on all pending motions December 18, 1956, and thereafter on February 11, 1957, all pending motions were overruled by him. Subsequent to the denial of these pending motions and on or about March 4, 1957, appellants filed a third supplemental motion for new trial on the ground of alleged newly discovered evidence. This too was denied by Judge Nordbye, following which the court pronounced

sentence and entered judgment pursuant to the jury's verdict.

It is the contention of appellants that they were deprived of a fair trial by virtue of Judge Hulen's death after verdict was rendered and by the fact that a successor judge heard and denied their post-trial motions for judgment of acquittal and for a new trial. It is urged that the successor judge was not qualified to pass upon the pending motions, particularly their motions for judgment of acquittal notwithstanding the verdict or in the alternative for a new trial, because not having presided at the trial of the case he did not have the "feel of the case". Rule 25, Federal Rules of Criminal Procedure provides as follows:

> "If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

Judge Nordbye was assigned as successor judge in this case in strict compliance with this rule. Federal criminal law and procedure are dependent upon Federal statutes. Under this rule it was the duty of the successor judge, in the first instance at least in the exercise of a sound judicial discretion, to determine whether he could satisfactorily perform the duties of the judge who presided at the trial and whom he succeeded. It is to be observed that in the instant case while Judge Nordbye was assigned to perform the unfinished trial of this case on June 16, 1956, he did not hear the pending motions until some six months later

and it is quite apparent from this record that in that time he thoroughly familiarized himself with the facts and satisfied himself that he could perform the duties to be performed by the presiding judge. Referring to this contention Judge Nordbye in the course of his opinion says:

> "* * * This Court is not unmindful that the observation made by the defendants as to the assigned Judge's being unable to have the 'feel of the case' is a matter that deserves careful consideration, and undoubtedly there is substance to defendants' position in this regard. On the other hand, this Court cannot escape the fact that this case has taken a long time to try, the defendants were represented by experienced and skillful counsel, and the Judge who presided at the trial was recognized by all parties to have been not only an able and experienced trial judge, but one who presided with impeccable fairness and impartiality. Consequently, it would seem that, under these circumstances and after consideration of the entire record, I should not evade the responsibility which rests upon me by summarily granting a new trial, but rather to the best of my ability attempt to render definitive rulings on the various aspects of the motions presented."

There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character. As has been observed, the defendants here were charged with attempting to thwart the criminal prosecution of Irving Sachs for Internal Revenue law violations. The

Internal Revenue agents on investigation reported that Sachs as president of Shu-Stiles, Inc. had fraudulently evaded taxes due the government by the company to the extent of $188,378.32. Criminal prosecution had been recommended by the agents of the Bureau of Internal Revenue and attorney Schwimmer was then employed to thwart this threatened criminal prosecution. The government's testimony tended to prove certain business transactions between Schwimmer and appellants by which the appellants profited, the payment of large sums of money by Sachs to Schwimmer, entries in books of Schwimmer indicating disbursement of sums of money on behalf of appellants, evidence that Schwimmer had purchased for appellant Connelly two suits of clothes, and evidence of visits by Schwimmer to and consultations with the appellants at various times. This general characterization of this testimony indicates that it was in the nature of circumstantial evidence by the government furnishing the basis for inferences by the jury and it was not disputed by appellants but their testimony went to either their lack of knowledge or other explanations of the transactions proven by the government. In these circumstances there was not much to be gained by hearing the testimony of the witnesses and observing their demeanor that could not be gained by reading the testimony and we think Judge Nordbye did not abuse his judicial discretion when he determined, as he manifestly did, that he could perform the duties to be performed by the presiding judge after verdict. The law governing the situation here presented was strictly complied with and we think that law provided due process within the requirements of the Fifth Amendment. *Meldrum* v. *United States*, 9 Cir., 151 F. 177; *Chin Wah* v. *United States*, 2 Cir., 13 F.2d 530; *King* v. *United States*, 6 Cir., 25 F.2d 242; *Owens* v. *Hunter*, 10 Cir., 169 F.2d 971; *McIntyre* v. *Modern Woodmen of America*, 6 Cir., 200 F.1; *Pessagno* v. *Euclid Inv. Co.*, D.C.D.C., 35 F.Supp.

743; *United States* v. *Green*, S.D. Ill., 143 F.Supp. 442. In *Meldrum* v. *United States*, supra, the authority of a succeeding judge to pass upon a motion for a new trial in a federal criminal case tried before another judge who died while the motion was pending was expressly sustained. In the course of the opinion in that case it is said:

> "Did the judge of the court below have authority to pass upon the motion for a new trial and impose the sentence? The plaintiff in error contends that he did not, that he had not participated in the trial, and that the right of the plaintiff in error to have the judge who presided at his trial take part with the jury at every step in the determination of his guilt or innocence was a fundamental right which could not be taken away by an act of Congress, • • •.
>
> "• • • Section 953 of the Revised Statutes as amended by Act June 5, 1900, c. 717, Sec. 1, 31 Stat. 270 (U.S. Comp. St. 1901, p. 696), provides that in case of the death of the judge before whom a cause has been tried the judge who succeeds him 'or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such case has been or is taken in stenographic notes • • • shall pass upon said motion and sign such bill of exceptions'; and it further provides that if said judge is satisfied that, owing to the fact that he did not preside at the trial or for any other cause, he cannot fairly pass upon said motion and allow and sign said bill of exceptions, he may in his discretion grant a new trial. If the succeeding judge can, as undoubtedly he may under this statute, deny a motion for a new trial, there can be no question of his power to further proceed in the case and render judgment upon the verdict."

We conclude that the contention that Judge Nordbye was disqualified to perform the duties to be performed by the presiding judge after verdict is without merit.

Appellants were subpoenaed as witnesses to testify before the grand jury and each of them did so testify. After the return of the indictment they moved to dismiss the indictment and suppress the testimony which they had given before the grand jury on the ground that they had not been advised that the prosecutor had decided at the time they testified to seek an indictment against them. Appellant Caudle was a lawyer with wide experience in criminal prosecutions on behalf of the government. Appellant Connelly was a man experienced in the investigating of fraud and criminal matters. He had been the chief investigator for a Senate committee investigating many fraudulent and criminal situations. The record definitely shows that each of the defendants was apprised of his constitutional rights. There was some doubt as to when the prosecutor had definitely decided to seek an indictment against them. After hearing testimony on the motion Judge Hulen decided when the prosecutor had decided to seek indictments against them and he suppressed all testimony given by them before the grand jury after that date, but denied the motion to suppress testimony given by them before that date and also denied their motions to dismiss the indictment. The ruling of the court, we think, was eminently fair to appellants. We shall not encumber this opinion with a long recital of the warnings given and the circumstances thereof. It abundantly appears that they were advised and were at all times aware of their constitutional rights. We think the contention of appellants in this regard wholly without merit.

The trial of this case began May 7, 1956, and the jury returned a verdict June 14, 1956. After the case had been on trial for some sixteen days the defendant Schwimmer suffered a heart attack and as hereinbefore noted a mistrial was declared as to him. Thereupon appellants moved for a mistrial as to themselves on the ground that certain evidence admitted as to Schwimmer alone was of such a

prejudicial nature that its effects could not be eradicated from the jury's mind by the court's instructions. Their motion was denied and the court instructed the jury that the testimony which the court identified, admitted as to Schwimmer alone, was withdrawn from the jury's consideration. In the course of its instruction on this question the court said:

> "Now, as to the testimony given by these two witnesses as I have referred to them as to these conversations with Schwimmer, I withdraw that testimony from your consideration. I have not gone into it in detail, but you will recall it. You are not to consider such testimony as evidence in this case of any character. Just forget that that testimony relating to the subject and at the times I have referred to was given in this case. Strike it from your minds entirely. It now has no bearing on the issues in this case and you will not consider it in any manner in arriving at your decision as to the guilt or innocence of either of the defendants in this case.
>
> "Does that cover the subject?"

The instruction was not excepted to. The testimony in no way implicated either of the other defendants on trial and we think the court's instruction proper, and we cannot presume that the jury disregarded it. *Blumenthal* v. *United States*, 332 U.S. 539; *Lutwak* v. *United States*, 344 U.S. 604; *Opper* v. *United States*, 348 U.S. 84; *Delli Paoli* v. *United States*, 352 U.S. 232. In *Blumenthal* v. *United States*, supra, two of the defendants had made admissions which the trial court admitted as to them only and in its instructions specifically limited such evidence as to them and told the jury to disregard such evidence in considering the guilt or innocence of the other three defendants. In the course of the opinion it is among other things said:

> "But the trial court's rulings, both upon admissibility and in the instructions, leave no room for

doubt that the admissions were adequatel excluded, insofar as this could be done in a joint trial, from consideration on the question of their guilt. The rulings told the jury plainly to disregard the admissions entirely, in every phase of the case, in determining that question. The direction was a total exclusion, not simply a partial one as the Government's argument seems to imply. The court might have been more emphatic. But we cannot say its unambiguous direction was inadequate. Nor can we assume that the jury misunderstood or disobeyed it."

In the very recent case of *Delli Paoli* v. *United States*, supra, the Supreme Court, reaffirming the doctrine of its prior decisions, said:

"It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

The declaration of a mistrial as to the defendant Schwimmer removed him from the case and it is to be noted that prior to the trial appellants sought to remove him from the case by a motion for severance. This declaration of a mistrial as to Schwimmer as effectively removed him from the case as would the granting of appellants' motions for severance. But it seems to be argued that appellants were prejudiced, both by having Schwimmer tried jointly with them and by removing him

by process of declaring a mistrial as to him. It is suggested that when Schwimmer was removed as a defendant they were deprived of his possible testimony on the assumption that he would have taken the stand in his own defense. This he might or might not have done and in this connection it is observed that he invoked the Fifth Amendment when he was called before the grand jury. Neither is there any assurance that had he taken the witness stand his testimony would have any tendency to exonerate appellants. Appellants' position after the severance of Schwimmer by the court's declaration of a mistrial as to him was no different than it would have been had he been named only as a co-conspirator. Even had Schwimmer been named as a co-conspirator only, his acts and declarations during the time of and in furtherance of the conspiracy would have been admissible against appellants. We think the removal of Schwimmer from the case was not prejudicial to appellants. *Carrado* v. *United States*, D.C., 210 F.2d 712; *Poliafico* v. *United States*, 6 Cir., 237 F.2d 97; *United States* v. *Beck*, 7 Cir., 118 F.2d 178; *United States* v. *Karavias*, 7 Cir., 170 F.2d 968. The motion for mistrial as to the appellants because of the severance of Schwimmer by the court's declaration of mistrial as to him was under the circumstances here disclosed addressed to the sound judicial discretion of the trial judge and we think this discretion was wisely exercised in denying appellants' motions.

The court on its own motion entered an order directing that in selecting jurors for this case residents of the city and county of St. Louis be excluded from the list of prospective jurors, and the prospective jurors were accordingly selected from other parts of the district. Prior to the entry of this order the defendants had moved for a change of venue on the ground, among others, that they could not have a fair and impartial trial in the district because of the prejudicial publicity, editorial and other-

wise, largely contained in the daily newspapers published in St. Louis and widely circulated and read, concerning alleged corruption of public officials in the Bureau of Internal Revenue and in the Department of Justice, and specifically relating to the method of handling income tax evasion cases in the Eastern District of Missouri, and the alleged corruption of public officials both in the District of Columbia and the Eastern District of Missouri. These motions were denied but the court then entered the above order, geographically excluding residents of the city and county of St. Louis. Section 1865(a), Title 28, U.S.C. provides:

> "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. * * *"

The order was in strict conformity with the statute and it did not eliminate any particular class but the jury as drawn represented a cross section of the geographic unit designated and was manifestly selected from that part of the district which the judge thought to be most favorable to an impartial trial. The contention that the order resulted in a "rural" jury is without foundation in fact. As disclosed by their examination on voir dire for instance, six of the panel had lived in St. Louis or other large cities for some time. Many of the other jurors lived in large towns. Neither were the prospective jurors exclusively engaged in agricultural pursuits but included a wide range of professions, trades and occupations. The action of the trial judge followed a practice warranted by this statute. *Myers* v. *United States*, 8 Cir., 15 F.2d 977; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Frazier* v. *United States*, 335 U.S. 497. In *Myers* v. *United States*, supra, it is said:

"Plaintiff in error, defendant below, filed a motion to quash the jury panel because of the exclusion, in the drawing, of jurors from Douglas county, in which Omaha is situated; it being urged that the population of Douglas county formed a large percentage of that of the division of the district in which the offense was committed and tried. The order excluding these jurors was made pursuant to a long-standing practice of the court that, in drawing jurors, the county in which the crime was committed should be excluded.

* * * * * * *

"The motion to quash the panel was properly overruled. The law authorizes the court to draw the jury as was done in this case, and it is not required to assign a reason for so doing. The presumption is that it acted in the exercise of a sound discretion. If requested to assign a reason for the purpose of making a record for review, we think proper practice would require this to be done; but, in the absence of such request, we do not think the discretion can be challenged on that ground. The burden is upon the party who seeks to challenge the alleged arbitrary action, and in this case that burden has not been successfully carried. *Spencer* v. *United States* (C.C.A. Eighth Circuit) 169 F. 562, 95 C.C.A. 60."

We must presume that it was the purpose of the trial judge to have the jury selected from such parts of the district as to be most favorable to an impartial trial.

After the trial had closed and the jury had returned a verdict finding appellants guilty, and a successor judge had been assigned to finish the trial of the case, appellants filed a motion for new trial on the ground of newly discovered evidence. In this motion it was alleged that two of the women jurors had concealed important facts relevant to their personal qualifications thereby impairing appellants' rights to intelligently exercise their challenges

and depriving them of a fair and impartial trial. These two jurors were women. On voir dire the judge propounded among others the following questions:

> "Have any of you or the immediate members of your family, mother, father, brother, sister or husband or wife, or children, other than the gentleman who was sheriff, have you or any immediate members taken part in behalf of either political parties in political affairs such as a candidate for office or committee worker?
>
> "Do either of you or are any members of your family affiliated or hold membership or office—we have covered county committees, but sometimes there are Democratic or Republican organizations separate from the committee, and sometimes Democratic clubs or Republican clubs. To your knowledge, are you or any member of your family any members of such club or organizations? if so, raise your hand."

Neither of these women jurors answered either of these inquiries in the affirmative. In referring to this incident Judge Nordbye in his opinion says:

> "The evidence at the hearing on the motions for a new trial, which supplanted the affidavits previously obtained, indicate that these two jurors, to wit, Goldie Brown and Grace Hoffman, were members of the Montgomery Township Republican Club in the years 1953, 1954 and 1955, but evidently from the testimony it would appear that they were not in 1956. Robert Hoffman, however, the son of Grace Hoffman, was treasurer of the committee or club in 1956. There is no showing here that Mrs. Hoffman knew that her son was treasurer of the local Republican Central Committee in 1956, and moreover, there is no showing that either of these jurors wilfully failed to answer truthfully the questions to which reference has been made. Furthermore, there is no showing that the defendants were prejudiced in any way by

reason of any Republican affiliation or activities of either of these two jurors. This Court has no right to assume that in this trial jurors of Republican political affiliation would be prejudicial to these defendants and that jurors of Democratic affiliation would be prejudicial to the Government. And finally, the record is bereft of any showing that there was fraudulent conduct on the part of these jurors."

We are in entire accord with this ruling.

It is contended that the court erred in denying a change of venue or a continuance. The motions were addressed to the discretion of the court, *Finnegan* v. *United States*, 8 Cir., 204 F.2d 105; *Stroud* v. *United States*, 251 U.S. 15, and on careful review of the record we are convinced that there was no abuse of that discretion.

It is next contended that appellants' motion for judgment of acquittal or a new trial should have been granted because the evidence is as consistent with innocence as with guilt. In considering the question of the sufficiency of the evidence to go to the jury and to sustain the verdict we must view the evidence in a light most favorable to the prevailing party, in this case the government, and the prevailing party is entitled to all such favorable inferences as may reasonably be drawn from the facts and circumstances proven. If when so viewed, reasonable minds might reach different conclusions then the issue is one of fact to be submitted to the jury and not one of law to be determined by the court. *Brennan* v. *United States*, 8 Cir., 240 F.2d 253; *Peters* v. *United States*, 8 Cir., 160 F.2d 319.

It appears without dispute that Irving Sachs was guilty of a wilfull and flagrant tax fraud to which there was apparently no defense. As heretofore noted the agents of the Bureau of Internal Revenue had recommended prosecution. In this situation Harry I. Schwimmer, a lawyer of Kansas City, Missouri, was employed for

the express purpose of thwarting this threatened criminal prosecution. His first ground for seeking relief was that Sachs had made voluntary disclosure. When it was shown that the so-called disclosure was not full and complete but was itself fraudulent Schwimmer abandoned that theory and sought to protect his client from criminal prosecution on the ground of ill health, claiming that his prosecution would probably result in his death. While it was shown that Sachs was an epileptic, the fact was not known to his own counsel, Shifrin, who had represented him for some twenty years, and even during the time the Department of Justice was considering the gravity of his malady he was able to look after his business in substantially his usual and normal manner. He was chief executive of Shu-Stiles, Inc., a substantial concern. At the government's request he was examined by Dr. Robert M. Bell, a consultant for the United States Public Health Service in neuropsychiatry. Dr. Bell reported that in his opinion any fatal outcome in the case of prosecution and trial of Sachs was "remote indeed". Schwimmer employed a number of doctors, none of whom made an examination of Sachs, but on the basis of reports and data submitted to them gave as their opinion that criminal prosecution of Sachs would constitute a clear and present danger to his health. Caudle disregarded the report of Dr. Bell; he also disregarded the recommendation of the Bureau of Internal Revenue and ordered that Sachs be not criminally prosecuted but that the case be treated on the basis of civil liability. His action in disregarding the recommendation of the Bureau of Internal Revenue and in disregarding the report of a government doctor was unprecedented and did violence to the accepted practice of the Department. It appears from the evidence that Schwimmer made frequent calls on Caudle and Connelly. There is evidence of their frequent conversations and there is evidence of Caudle's and Connelly's continued activity and interest on behalf of

Schwimmer's client. Schwimmer received in payment as compensation for his services in seeking to thwart the criminal prosecution of Sachs some $46,000, from which apparently he paid to each of the appellants or on their behalf substantial sums of money. There is also undisputed evidence that Schwimmer presented to Connelly two suits of clothes made to order.

As has heretofore been noted, the appellants, through Schwimmer, had certain business transactions in which they made substantial profits. The jury may well have inferred that these so-called business transactions were a mere cover-up for the fact that Schwimmer was compensating them for assisting him in thwarting the prosecution of a man confessedly guilty of defrauding the government. It is strenuously urged that the evidence was insufficient to prove that Connelly knowingly participated as a co-conspirator. It appears from the evidence that Connelly first called Charles Oliphant, Chief Counsel of the Bureau of Internal Revenue, in August of 1948, when Schwimmer had scheduled a conference with Oliphant, saying that Schwimmer had asked that "we call you and let you know we know him".

The case was referred to the Department of Justice August 12, 1949, after pending about four years in the Bureau of Internal Revenue where Schwimmer, with the assistance of Connelly, had secured its delay. Subsequent to the transfer of the case to the Department of Justice Schwimmer obtained a further delay of one month. In September of 1949 Connelly then called Caudle and requested further postponement for his "friend" Harry I. Schwimmer. In response to this request Caudle relayed a message through Connelly to Schwimmer that Schwimmer could come in whenever he wanted but as soon as possible and that a postponement would be all right because the statute of limitations was not involved. A few days subsequent to this contact between Connelly and

Caudle, Sachs paid $2,500 from Shu-Stiles, Inc. money to Schwimmer and on October 12, 1949, gave Schwimmer a check for $10,000, from which Schwimmer purchased an oil royalty for Connelly. The jury was warranted in believing that these expenditures by Schwimmer on behalf of Connelly were to reward him for his services in assisting to thwart the criminal prosecution of his client Sachs and there are other attending circumstances corroborating this conclusion. As pointed out by Judge Nordbye:

> "That Connelly knew and understood that Schwimmer's business with Caudle was an attempt to obtain a commitment from the Department of Justice that there would be no criminal prosecution in the Sachs case, seems evident from the conversation which Connelly had with Oliphant over the telephone on January 16, 1951. At that time Schwimmer already had obtained a letter from Caudle stating that there would be no criminal prosecution in the *Sachs* case, but notwithstanding he was attempting to obtain a similar letter of no-prosecution from the Bureau of Internal Revenue. In a conversation with Connelly over the telephone, Oliphant stated, 'You know Schwimmer on Sachs—does he just want to look good?' And Connelly replied, 'Wants to make sure not going to reverse justice again.' Certainly, this conversation would indicate that Connelly was aware of Schwimmer's plans to have both Departments committed on the Sachs case so that he need have no fear that the Bureau would render a ruling adverse to that which he obtained from the Justice Department. Moreover, it must be apparent that Connelly knew that Schwimmer had obtained a no-prosecution letter from Caudle at that time. The friendly relations between Connelly and Schwimmer and the six or seven or more telephone calls to government officials made by Connelly with reference to the *Sachs* case fully warranted the jury in determining that Connelly's relation with the

case that was pending in the Bureau of Internal Revenue and then in the Department of Justice was something more than mere routine telephone calls for the arranging of appointments."

The inferences to be drawn from all the surrounding circumstances connecting Connelly with the activity of Schwimmer warranted the jury in returning its verdict of guilty as to both appellants.

There was in evidence a document in Schwimmer's handwriting indicating that in connection with Schwimmer's attempt to thwart the criminal prosecution of his client, Schwimmer paid substantial sums to or on behalf of appellants. These circumstances, we think, warranted the jury in inferring that Schwimmer paid the appellants substantial sums of money for their assistance in attempting to thwart the criminal prosecution of his client. We conclude that the evidence, with the inferences that might reasonably be drawn therefrom by the jury, was substantial and that there was no error in denying appellants' motion for judgment of acquittal or for a new trial.

It is however contended that the court erred in admitting in evidence a document referred to in the evidence as Exhibit 100(j) which we have heretofore adverted to as a document in Schwimmer's own handwriting taken by the government from one of his account books. There was ample evidence to warrant the jury in finding, as it manifestly did, that the defendants Schwimmer, Connelly and Caudle had entered into a conspiracy as charged in the indictment. Any act or admission by either of the participants in the conspiracy occurring during its existence and in furtherance of its purposes was admissible as to all defendants. *Lutwak* v. *United States*, 344 U.S. 604; *Wiborg* v. *United States*, 163 U.S. 632; *Cwach* v. *United States*, 8 Cir., 212 F.2d 520; *Braatelien* v. *United States*, 8 Cir., 147 F.2d 888; *Harper* v. *United States*, 8 Cir., 143 F.2d 795. The exhibit contains the following:

"Oct—49

"Loan $2,500
From I. Sachs

"Shu-Stiles	$10,000
"Pd out Oil Royalty M. C.	4,200
"Held in Escrow to be paid out depending on whether I. Sachs case is dropped."	$ 5,800

As said by Judge Nordbye in considering the admissibility of this exhibit:

> "Government's Exhibit 100-j does not represent the entry of a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy."

We are in accord with Judge Nordbye's views. There was independent evidence that on October 12, 1949, co-conspirator Sachs, president of Shu-Stiles, Inc., gave Schwimmer a $10,000 check in addition to a prior payment of $2,500 on September 22, 1949, both of which are reflected in this exhibit. This testimony shows that these entries were made during the existence of the conspiracy. We think the exhibit was properly admitted as against both appellants.

There was admitted in evidence over the objection of appellants testimony of certain telephone conversations between Schwimmer and Oliphant, Caudle and Oliphant,

and Connelly and Oliphant. These were based upon transcripts made by Oliphant's secretaries in the so-called Oliphant log which was a record kept in the regular course of Oliphant's official duties by Oliphant's secretaries. The sole objection to the admission of this evidence was that it violated the best evidence rule. The evidence shows that when a call would come in to the office over the official, as opposed to the private office telephone, of the Chief Counsel for his personal attention, the secretaries would listen in with earphones and transcribe the official content only as a routine matter in the regular course of their duties. The records made recorded the calls in full unless the call concerned only the making of an appointment, in which case they just recorded that fact in its essence. Although the objection was based solely on the ground that this evidence was violative of the best evidence rule it is now argued that the entries were not kept in the regular course of business, but were private entries. The practice of keeping these records of official calls and visits was a well established practice which had been followed not only by Mr. Oliphant but by his predecessor in office. This testimony was admissible, we think, under the Federal Business Records Act, Sec. 1733(a), Title 28, U.S.C.; *Finnegan* v. *United States*, supra; *Harper* v. *United States*, supra; *Holland* v. *United States*, 10 Cir., 209 F.2d 516; *Stegemann* v. *Miami Beach Boat Slips*, 5 Cir., 213 F.2d 561. The evidence conclusively showed that these records were made in the usual and systematic course of the business to which they had reference and they specifically referred to actions occurring at the time of their entry. We need not here enumerate the reasons for the rule making such entries admissible. They are too well established to require citation of authorities. There was no error in admitting this evidence, which incidentally directly showed Mr. Connelly's continued interest in the success of Mr. Schwimmer's undertaking to prevent the criminal prosecution of his client.

It is finally urged that the court erred in receiving evidence on rebuttal to the effect that appellant Connelly accepted gifts of clothing from Schwimmer. The evidence so received showed that Connelly received two suits worth $315.78 and a top coat worth $110 from Schwimmer. On cross-examination Connelly was repeatedly asked whether he had received any money, property, gifts or anything of value from Schwimmer during the time of the transactions here in question. He was quite evasive but finally answered that his wife might have received some flowers and he might have received some neckties. On further inquiry the witness said that he could not "recall" any others. He was then directly asked whether he had not received two suits of clothes "of a value over $300" which he then admitted receiving but that he could not recall when he received these gifts or whether he had received anything else of value from Schwimmer. On re-examination by his counsel the witness was asked to give the dates of the presents given him. In answer to this Connelly testified that in the past he had frequently received gifts from friends at the Christmas season. It appears from the cancelled checks produced that the gifts of two suits of clothes were given in the month of July, 1952. The government also showed that Connelly received a top coat in November or December of 1952. The testimony was admitted as to Connelly alone. We think it was clearly admissible on the question of the credibility of the witness and on the question of intent. No exception was saved by appellants to the instruction of the court so limiting this testimony. Acts done by a conspirator even after the termination of the conspiracy are properly admissible as having probative value as bearing on the intent and purpose of the conspirator in doing acts during the existence of the conspiracy. Thus in *Lutwak* v. *United States*, 344 U.S. 604, it is said inter alia:

> "It does not necessarily follow that acts and declarations made after the conspiracy ended are not ad-

missible. In this case, the essential fact of the conspiracy was the existence of phony marriage ceremonies entered into for the sole purpose of deceiving the immigration authorities and perpetrating a fraud upon the United States. *Acts* which took place after the conspiracy ended which were relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies were competent * * *."

It is now well established that evidence of acts or transactions not done in furtherance of the conspiracy may nevertheless be admitted if they tend to connect the conspirator with the conspiracy "by explaining his state of mind." *Glasser* v. *United States*, 315 U.S. 60. Neither is there any merit to the contention that this evidence was not admissible because it was offered in rebuttal. *Walder* v. *United States*, 347 U.S. 62. We conclude that there was no prejudicial error in admitting this testimony. We have given consideration to all the other contentions urged by appellants but think they are wholly without merit.

Appellants were represented at the trial of this case by skilled counsel of wide experience. The case has been well briefed on either side and ably argued. On the whole record we are convinced that the appellants had a fair trial and that there were no prejudicial errors committed by the trial court. The judgment appealed from is therefore affirmed.

A true copy.

Attest:

E. E. KOCH,
Clerk, U. S. Court of Appeals,
Eighth Circuit,
By EUGENE C. FISHER,
Deputy Clerk.

(Seal)

APPENDIX C.

JUDGMENT.

United States Court of Appeals
for the Eighth Circuit.

No. 15746 - - - - - - September Term, 1957.

Friday, November 15, 1957.

Matthew J. Connelly and T. Lamar Caudle,
Appellants,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgments and sentences of the said District Court, in this cause, be, and the same are hereby, affirmed.

And it is further Ordered by this Court that the defendants in the said District Court, Matthew J. Connelly and T. Lamar Caudle, do surrender themselves to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgments and sentences imposed upon them, and each of them, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 15th, 1957.

APPENDIX D.

ORDER DENYING PETITION OF APPELLANTS FOR REHEARING.

United States Court of Appeals
for the Eighth Circuit.

No. 15746 - - - - - - September Term, 1957.

Friday, December 13, 1957.

Matthew J. Connelly and T. Lamar Caudle, Appellants, vs. United States of America.	Appeal from the United States District Court for the Eastern District of Missouri.

The petition for rehearing filed by the appellants in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

December 13th, 1957.

.....

APPENDIX E.

Supreme Court of the United States.

No. ....., October Term, 1957

T. Lamar Caudle,
Petitioner,

vs.

United States of America.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 23rd, 1958.

(Sgd) Charles E. Whittaker,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of December, 1957.